The Central Law Journal.

SAINT LOUIS, MAY 18, 1877.

CURRENT TOPICS.

ON THE 7th inst., Hon. T. M. Cooley of the University of Michigan and Chief Justice of that state, commenced a course before the law students of Johns Hopkins University at Baltimore. The course will continue till the first day of next month. The subject is the Law of Torts, and is divided into twenty lectures as follows: The General Nature of Legal Wrongs; A General Classification of Legal Rights; The Method of Obtaining Redress for Wrongs; What Parties may be held Responsible for Legal Wrongs; Joint Wrong-doers; Wrongs Affecting Personal Security; Affecting Civil Rights and Political Privileges; Affecting Personal Property; The Invasion of Rights in Real Property; Injuries to Incorporeal Rights; to Family Rights; Wrongs in Confidential Relations, from the Non-performance of Duty and the Neglect of Official Duty; The Immunity of Officers where Individual Injury Results from their Actions; Wrongs from Negligence; Torts Accomplished through Fraud; The Influence of Motive in the Law of Torts; Responsibility of Owners of Property and Masters for Injuries.

IN Gardner v. Kellogg, recently decided in the Supreme Court of Minnesota, 1 N. W. Rep. 12, it is held that in the trial of a civil action founded upon an assault of an indecent character committed upon a female, the same rule of evidence applies as in a criminal trial on an indictment for the same offense, in regard to proof of complaint made by the female concerning the assault immediately after the occurrence and while still suffering from the result of the injury received. Whatever may be the reason for the rule applied to criminal cases, whether it is that statements of their character as to the cause and immediate consequences of the injury, made by the injured party so soon after the injury and while still under the influence of the smart and suffering occasioned by it, constitute a part of the "*res gestæ*" as was held in Thompson *et ux.* v. Trevannion, Skin. 402, approved in Avenson v. Kinnaird, 6 East, 188, and in Ins. Co. v. Mosley, 8 Wall. 397; or whether it is that silence under such circumstances will raise, if not explained, an unfavorable presumption affecting the credibility of her testimony as a witness, and hence, as is suggested by Woodruff, J., in Baccio v. People, 41 N. Y. 265, affirmative proof is admissible to repel the inference, it would seem quite clear, that the rule has for its support a foundation equally as firm and reasonable in civil as criminal actions.

A MEMORIAL recently submitted to a committee of the legislature of Illinois explains why it is that the reports of New York and Ohio are furnished so cheaply,—the former at $2, and the latter at $2.50 per volume. In Ohio the state pays the reporter a salary, and the judges are required to make the head-notes in each case. The state purchases 350 copies of each volume at $2.50 per volume. To this it may be added, that the number of decisions reported appears to be limited in that state by the discretion of the judges, so that reports are not ground out as rapidly there as in Illinois and Missouri. It follows that a larger edition of each volume is necessarily sold; so that, at the price named, the business of printing and selling those reports is probably sufficiently remunerative. In New York the reporter receives an annual salary of $5,000, and $2,000 more for clerk hire. He has the custody of the opinions of the court, after they are delivered, and charges for the copies furnished on application; so that the revenue of his office is believed to be about $10,000 per annum. The exceedingly large edition of 3,000 copies of each volume is printed, and about 600 are struck off annually thereafter for some years. It is very easy to see that with nothing to pay the reporter, and with such a circulation, there is profit in publishing those reports at $2 per volume.

CONSIDERABLE criticism is being directed against the eloquent and learned lawyer who at present presides over the department of state, because, since he accepted the position in the cabinet of President Hayes, he has appeared in court as a counsel in private litigation. The objections which have been urged against this course have, for the most part, been based upon the idea that there is something derogatory in a member of the cabinet engaging in any other undertaking while occupying this high position. A stronger argument would seem to be that holding a post of the greatest and most delicate responsibility—a post second only to that of chief magistrate—it might well be assumed, imposes such duties upon the incumbent of the office as would scarcely admit of his pursuing another different avocation. Still, even this may be an unfair conclusion; for there are men whose capabilities for performing work can not easily be measured. Mr. Gladstone, while holding one of the highest offices in the English government, wrote and published his Studies on The Homeric Age; and the author of Coningsby has not been deposed from his high position because he occasionally leaves affairs of state to write a novel. Nor do we suppose that Mr. Bancroft's History of the United States was entirely neglected, while he was secretary of the navy. Yet these are all labors beside which the trial of a few cases in court is certainly but a trifling affair. But Mr. Evarts' course becomes even less open to criticism when it is stated that the cases which he appeared in had been accepted by him and partly prosecuted prior to his appointment to the secretaryship of state.

A BRITISH medical journal calls attention to a peculiar ruling made recently on circuit, in a trial for administering cantharides to a girl, the statute under which the prisoner was indicted requiring that the thing administered should be "noxious." The prisoner, aged twenty-five, gave to the prosecutrix, a girl of about fifteen, two figs, in which the powder of cantharides was found. Owing to this discovery, the figs were not eaten. A chemist stated that he obtained about a grain and a half from one fig; but the other was not examined. He said that twenty-four grains might be fatal, and that the quantity found in this case "would have no effect on the human system." The counsel for the prisoner rested his defense upon this statement, which was given in evidence for the prosecution. He contended that, as the quantity found was insufficient to injure a person, it could not be regarded as "noxious;" and the learned judge, Chief Justice Cockburn, held that the objection was fatal, and directed an acquittal. The journal in question contests this principle and maintains that, in the opinion of all toxicologists, the powder of cantharides is in all cases a noxious, and in most cases a poisonous substance, and says: "Unless some such principle be adopted, we do not see how it is possible to suppress the crime of poisoning. If noxiousness is to rest upon the indefinite condition of quantity, it will be necessary to take into consideration the influence of age, idiosyncrasy, etc. If this ruling is to be carried out, we do not see what is to prevent a man from administering with impunity arsenic, strychnia, or prussic acid. He has only to keep within the medicinal dose. His counsel may then safely contend that quantity is a necessary element in determining what is noxious; and, so long as some druggist can be brought forward to assert that the quantity of either of these substances administered would have no effect upon the human system, he is safe for an acquittal. On the other hand, health and even life may be imperilled, if this new definition of a noxious substance is to be received as a correct interpretation of the statute on poisoning." The cases to be found in the books on the subject are few. In England see Reg. v. Wilkins, 9 Cox's C. C. 20; Reg. v. Hanson, 4 Cox's C. C. 138; 2 C. & K. 912; Reg. v. Button, 8 C. & P. 660; Reg. v. Delworth, 2 Mood. & Rob. 531; Reg. v. Walkden, 1 Cox's C. C. 282. And in this country see Com. v. Stratton, 114 Mass. 303.

IN National Bank of the Commonwealth v. Mechanics' National Bank of Trenton, decided at the last term of the United States Supreme Court, it was held that where a national bank, holding deposits, refused to pay the same on demand, and a receiver was afterwards appointed under the National Currency Act, the owner of the deposits was entitled to interest thereon, and that compound interest was also recoverable. By the common law, interest could in no case be recovered. As early as the reign of King Alfred, in the ninth century, it was held in detestation. Churchmen and laymen alike denounce it. Glanville, Fleta, and Bracton, all speak of it in terms of abhorrence. The first English statute upon the subject was the 37 Henry VIII, ch. 9. This statute fixed the lawful rate of interest at ten per cent. per annum, and visited receiving more with forfeiture and imprisonment. Other statutes regulating the subject were passed in later reigns from time to time, until finally an act of Parliament in 1854 (17 and 18 Vict., ch. 90) swept all the usury laws in the English statute books out of existence, and established "free trade in money." The first impulse to public opinion in this direction was given by Bentham, near the close of the last century. The final result was doubtless largely due to his labors. The 50th section of the National Banking Act (13 Stat. 113) requires the comptroller of the currency to apply the moneys paid over to him by the receiver "on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction." The act is silent as to interest upon the claims before or after proof or judgment. Can it be doubted that a judgment, if taken, would include interest down to the time of its rendition? Section 996 of the Revised Statutes of the United States (p. 182) declares that all judgments in the courts of the United States shall bear the same rate of interest as judgments in the courts of the states respectively where they are rendered. Interest is allowed by the law of New York upon judgments from the time they are perfected. Rev. Code of N. Y. (ed. 1859, vol. 3, p. 637. If these claims had been put in judgment, whether in a court of the United States or a state court of that state, the result as to interest upon the judgment would have been the same. It was unnecessary to reduce them to judgment, because they were proved to the satisfaction of the comptroller. After they were so proved, they were of the same efficacy as judgments, and occupied the same legal ground. Hence, they are within the equity, if not the letter of these statutes, and bear interest as judgments would have done. Sedgwick on Constr. 311, 315. Numerous cases, both English and American, are to be found in which compound interest, under special circumstances, was recovered. See *Ex parte* Beavans, 9 Vesey, Jr. 223; Coliot v. Walker, 2 Anstr. 495; Hamilton v. La Grange, 2 H. Black. 145; Kellog v. Hickok, 1 Wend. 521; Tyler v. Yates, 3 Barb. 222; Rennow, Dickens, Cam. & Norw. 357; Aurora City v. West, 7 Wall. 82; Town of Genoa v. Woodrow, 92 U. S. S. C. 502.

WE ARE constantly in receipt of inquiries from attorneys having claims against railroads which are in the hands of receivers, as to whether the federal courts have adopted the rule of allowing claims for supplies furnished at a recent period, before the receivers took possession. We answer that, so far as our knowledge goes, the federal courts have adopted no such rule, but the reverse. We alluded to this matter at some length in a

former volume of this journal (vol. 3, p. 636). Since then it has been announced by Dillon, Circuit Judge, in an oral opinion delivered upon the intervening petition of Hopkins, in the case of Ketchum v. The Pacific Railroad, that Mr. Justice Miller, at a late term of the United States Circuit Court for the District of Iowa, rejected all such claims, irrespective of the date at which the supplies were furnished. Indeed, in this case of Ketchum v. The Pacific Railroad, after supply-claims to the amount of some $300,000, and other floating debts which were not contracted for supplies, had been audited and paid by the receivers, none of the parties in interest opposing, the railroad attorneys for some reason or other concluded to oppose the last claim — that of the Bremen Bank, which came straggling in at the eleventh hour. This claim amounted to some $400 or $500, while the amount of general indebtedness which had been previously paid by the receivers—we mention it to the great honor of the bondholders—amounted to $700,000. Nevertheless, this claim being opposed, the court, Treat, J., felt bound to administer the law, and it was rejected. It appears, then, to be a settled rule of the federal courts, that, no matter how recent the date at which the supplies were furnished before the appointment of the receivers, and no matter how permanent their character, as in the case of locomotives or steel rails, they can not be paid for if the beneficiaries under the mortgage before the court object. But the question still remains: Is this such a rule of equity as can permanently stand without exceptions? We do not believe that it is. Where a railroad mortgage empowers the trustees, after default in the payment of principal or interest, to take possession of the road, and operate it or sell it for the benefit of the bondholders, and they neglect to exercise this power, and after default and notorious insolvency still leave it in the hands of the company, and the company contracts debts for supplies, in order that it may be kept in operation with safety for the benefit of the public,—can the mortgagees, standing by and looking on while this is done, afterwards step in and take to themselves whatever betterments the property thus receives, without any compensation to those who have furnished them? Is not the rule of admiralty, after all, a good one to apply to a railroad thus situated? We believe it is. A railroad is not like ordinary property; it is a public agency. It must be kept in a safe condition, and must be continuously operated for the carriage of the mails, and otherwise for the benefit of the public. It can no more be suffered to stop or fall to pieces, or to become dangerous to travel, than a ship can be suffered to go down at sea with all on board. In the juncture we have named, is not the rule a good one, that he who furnishes the last assistance must first be paid? Is not the corporation to be deemed, under such circumstances, a mere tenant at will and agent of the mortgagees, and should not the material-man be treated as having given credit to the latter, and not to the former?

NOTICE RECEIVED FROM TITLE PAPERS.

One of the familiar doctrines of equity jurisprudence is that which protects purchasers in good faith against the assertion of adverse claims to the property purchased. But, in order that they may be entitled to such protection, they must have purchased without notice, actual or constructive, of such claims. When the subject of the purchase is real property, the purchaser ordinarily relies upon the public records, provided by the registry laws of most of the states, for information as to the title. If, from such records, a connected chain of title appears, by a succession of deeds from the general government down to the grantor, it may be safely assumed that he is the true owner, unless there is an outstanding equity or unrecorded conveyance in favor of some one else.

The purchaser has constructive notice of the contents, not only of his own deed, but of every instrument constituting a link in his chain of title, whether such instrument comes to his possession or not. And, if the recitals in any one of such instruments disclose an outstanding title, whether legal or equitable, he will be as effectually charged with notice as though he had actual knowledge of the facts disclosed by such recital, whether the recital consists of an unqualified statement of the existence of the outstanding title, or directly refers to another instrument where the same is declared. And such purchaser, charged with notice, in this manner, of any trust subject to which the legal title was held by his grantor or any antecedent owner of the real estate, takes the same subject to such trust, and holds as trustee for the *cestui que trust* whose interest is disclosed by the title papers or facts to which their recitals would lead an inquirer of ordinary diligence. Hackwith v. Damron, 1 Monroe, 237; Neale v. Hagthorp, 3 Bland, 551, 586; Hagthorp v. Hook, 1 Gill & J. 270, and cases cited below.

So where, upon the face of the deed from the grantor, there is reference to other transactions in relation to the same property, the purchaser shall be deemed to have constructive notice of the instruments recited or referred to in his deed. Oliver v. Piatt, 1 How. (U. S.) 333, 410. This doctrine is none the less applicable where the fact of which the purchaser has constructive notice is merely the existence of a contract to convey, and the conveyance to be made is an equitable interest, and not the legal title to the property. Acer v. Westcott, 1 Lansing, 193. And where the deed, whether it be that of his immediate grantor, or of one more remote, is fraudulent on its face, one who purchases under it is a purchaser with notice of the fraud, and the land will be subject to the lien of a subsequent judgment creditor. Johnson v. Thweat, 18 Ala. 742.

In the case of Nelson v. Allen, 1 Yerg. (Tenn.) 360, 367–8, this doctrine is applied to a purchaser at an execution sale, where the transaction is classed as a conveyance by statute. The conveyance is declared to consist of the judgment, the levy, and the sheriff's deed, each of which is held

to be an essential requisite to constitute a conveyance. Upon the validity of each of these constituents must the purchaser depend to effectuate a transfer of the interest of the judgment debtor, and the absence of either would render the conveyance inoperative for the purpose of vesting such interest in the purchaser. The record of the judgment and decree forming part of the conveyance under which the property was claimed in this case, when looked into, disclosed the fact that such judgment and decree were utterly void for want of jurisdiction in the court by which they were rendered. It appeared that the plaintiff in this case was the son and heir of A. N., and, at the time of the suit in which the void judgment was rendered, was an infant of tender years, was not a party to said suit, and was never before the court; that one H. caused himself to be appointed, in Tennessee, administrator of the estate of A. N., who lived in Georgia up to the time of his death, and left no personal property there, and that he left none in Tennessee. H., in the character of such administrator, and also in the character of creditor, under color of such authority as was conferred by statute, instituted his suit to charge the real estate of the son and heir in Tennessee with the satisfaction of his claim against the ancestor, prosecuted the suit to judgment and decree, and at the execution sale became the purchaser of a tract of six hundred and forty acres of land for the price and sum of twenty-five dollars. The notice of the facts above recited, as disclosed by the record of the judgment, was held to be conclusive upon all those who held under the purchaser at the execution sale, for the reason that they could not make out their title except by reference to such sale as a necessary link to connect them with the original owner; and this involuntary conveyance was not complete without the judgment, the record of which would disclose the facts.

As a fair illustration of the remoteness of the conveyance, the recitals of which are held to be constructive notice to purchasers, it is sufficient to state that, when the title is traced to a patent from the general government, and the recitals are contained in such patent, they are held to be notice to all purchasers of the real estate. Bonner v. Ware, 10 Ohio, 465; Brush v. Ware, 15 Pet. 93.

The lien which the vendor of real estate has upon the same for the purchase-money is one which will always be protected by a court of equity, where it can be done without prejudice to innocent purchasers. And when, by reference to the deeds through which the title of the purchaser's grantor was derived, he might have learned that a former grantor had sold on a credit, and his grantee had done likewise, it was held to be his duty to inquire of all the parties,—particularly the creditor, to whom the several purchasers had respectively assumed payment of the purchase-money,—and learn whether or not the same had been paid. Not having exercised this diligence, it was held in Honore's Exr's v. Bakewell, 6 B. Monroe, 67, 73, that the land was still charged with the vendor's lien, notwithstanding that the purchaser had no actual notice of the same.

In Martin v. Nash, 31 Miss. 324, it was held that a purchaser, at a sheriff's sale on an execution against the original enterer, could only make out his title by reference to the books in the land office, which show the entry; and if there was an entry of assignment there, prior to the rendition of the judgment upon which the execution was based, it would amount to constructive notice and would be binding upon the purchaser.

This doctrine is frequently invoked where title is claimed under a will; as where, in Harris v. Fly, 7 Paige Ch. 421, a testator devised his farm to his son, and gave to his two daughters a legacy of one thousand dollars each, to be paid by the son, whom he made residuary legatee. The real estate was held in equity to be charged with the payment of the legacies, unless there was something in the will to rebut the presumption that the testator intended so to charge the estate devised; and a subsequent purchaser from the devisee or his grantee, who was obliged to trace his title through the will, was held to have constructive notice of the charge, and to take the land subject thereto. And where the testator, in the will under which the purchaser claimed, devised to his son fifty acres out of the north-west corner of the tract claimed by the purchaser, unless it had been selected elsewhere, and never given up, this would be sufficient to charge the purchaser with constructive notice of the claim of the son for fifty acres, because any person, on reading the will, would be led to inquire whether the devisee had got his fifty acres, and if he had taken it elsewhere than in the corner designated. The information contained in the will was sufficient to put the purchaser upon inquiry, and this would amount to notice. McAteer v. McMullen, 2 Barr (Pa.), 32; Johnston v. Gwathmey, 4 Litt. 317. It will be noticed that a question, as to the certainty with which the particular property affected by the will was indicated, seemed to be involved in this case. "Fifty acres out of the north-west corner" would be rather an indefinite description for ordinary purposes; and is rendered still more uncertain by the conditional nature of the devise by which the ancestor's disposition of the fifty acres out of the designated corner of his farm is made to depend upon the fact that the son has not already selected his allotment elsewhere. It has been frequently held that the recitals in deeds and other instruments affecting the title to real estate do not amount to constructive notice to purchasers, unless such recitals are sufficiently clear and explicit to lead to actual knowledge. See French v. The Loyal Co., 5 Leigh. 629; Lodge v. Simonton, 2 Penn. 439. But it is not always required that the recitals shall amount to express notice of the precise land affected. It is deemed sufficiently certain, as in the case of McAteer v. McMullen, *supra*, if it is capable of being rendered certain. So where the codicil to a will, through

which the title to land was traced, recited the fact that the plantation and tract of land in a particular township, near to the premises of a Mr. H, was the joint property of the testator and another, the notice was held sufficiently certain, though it did not state whether the land joined that of H on the north, south, east or west side. Especially was this so, where this tract was the only one owned or possessed by testator in that township at the time of his decease, or which answered the description in any point. Lodge v. Simonton, 2 Penn. 439. And where L purchased a church and lot of H. B, who had previously executed an agreement allowing to certain denominations of Christians certain privileges and benefits in the church property, and in his deed to L declares that the same is conveyed, etc., "together with all and singular the rights, liberties, privileges, hereditaments and appurtenances thereunto belonging, in as full and ample a manner, and with all the same rights and conditions, authorities and agreements with which said H. B. and wife now hold the said premises, as regards all or any assemblies for divine worship;" it was held that the above quoted recital was full notice to the purchaser of the previous agreement made with the bodies of Christians. Bellas v. Lloyd, 2 Watts, 401. As a recital to operate as notice to purchasers, the above probably goes to the uttermost limit of obscurity. In the case of Bell v. Twilight, 2 Foster (N. H.), 500, 521, the operation of the recital is confined to the fact recited. There the second mortgage referred to a prior mortgage in which it was recited that "part of the premises above described are subject to a lease and mortgage to D. F. & C., and a mortgage to S. F., B. F., and H. F., as by reference to the Rockingham records will more fully appear." It was held that this would only amount to notice of the conveyances described, and if there were none such, would not be notice of an unregistered conveyance to D. F. and wife. So, also, in Kaine v. Dennison, 10 Harris (Pa.), 202, it is held that a recital in a deed that the same was executed in fulfillment of a trust reposed in grantor by grantee, does not amount to notice of any other trust than one in favor of the grantee. But where land was mortgaged to secure the payment of two notes, neither of which had any priority over the other, and which were due to different payees, at a sale of the land to satisfy one of them, the purchaser will be charged with notice of the lien of the other, because the mortgage under which the sale is made recites the fact. Burrus v. Boulbac, 2 Bush, 39.

A purchuser from one of two joint owners or tenants in common would, of course, have notice of the interest of his grantor's co-tenant, where such interest is shown by the conveyance to which he must look for the title of his vendor, whether the instrument be recorded or not. Campbell v. Roach, 45 Ala. 667. And a deed of release from one of the members of a partnership, to himself and partner, describing them as a firm engaged in a certain business, was considered an instrument of such singularity as to put the purchaser upon inquiry, and so charge him with notice of the fact that this was partnership property, while a deed from a third party to the same grantees by their firm name would only give notice that they were tenants in common. Sigourney v. Munn, 7 Conn. 324. It is well settled that a second mortgagee has constructive notice of a prior mortgage, mentioned in the deed to his mortgagor. Baker v. Mathews, 25 Mich. 51.

The constructive notice by which purchasers are affected is not limited in its operations upon them merely for the purpose of binding them by prior conveyances. Its effect has been extended to subsequent transactions in relation to the same property. As where several tracts of land are included in one mortgage, and are subject to sale in satisfaction of the debt secured by the mortgage, in the inverse order of their alienation, the release of a tract subsequently conveyed, valued at more than the debt, would prevent the mortgagee from foreclosing on a tract previously aliened, provided he had notice of such prior alienation, at the time of the release. Such notice would be implied from the recitals in the release, which mention a bond and mortgage of the previously aliened tract, given by the alienee as further security to the mortgagee. Guion v. Knapp, 6 Paige, 35. This plainly carries the operation of notice of this character further than the constructive notice from registration; for it is held in a case (Howard Ins. Co. v. Halsey, 4 Seld. 271,) where the same doctrine is maintained as in Guion v. Knapp, that the mortgagee, when applied to for a release, is not bound to examine the records to see whether any of the tracts have been aliened or not. Stuyvesant v. Hall, 2 Babb. Ch. 151; George v. Kent, 7 Allen, 16. But no merely collateral recitals will affect a purchaser; as where, in a deed to one piece of land, the title to another piece is mentioned, and the purchaser subsequently becomes the purchaser of the other piece, the recitals in his first deed will not amount to constructive notice of the title to the second purchase. The recitals are notice of the facts recited only so far as they refer to the title of the property affected by the instrument. Boggs v. Varnen, 6 W. & S. 469.

This doctrine receives its most frequent application in cases involving the title to real estate; but this is only an incident of the manner in which property of a permanent nature is conveyed. The same principles have been held to apply to all cases of personal property where the title is necessarily derived by deed or other writing. Christmas v. Mitchell, 3 Iredell, 535. And it was also held in this case that he must look to those documents themselves, and not trust to the statements of third parties as to their recitals. As a further illustration of this point, see, also, Hill v. Simpson, 7 Ves. Jr. 152, where one of two executors transferred to his bankers certain stocks held by the testatrix in her lifetime as executrix, alleging that they were his by the will of the testatrix, and the bankers received them as security for

money which the executor owed them. At the hearing of the bill against the executor and the bankers, the latter denied any knowledge or suspicion that the stock did not belong to the executor. The Master of the Rolls said: "Common prudence required that they [the bankers] should look at the will, and not take the executor's word as to his rights under it. If they neglect that, and take the chance of his speaking the truth, they must incur the hazard of his falsehood. * * * It was gross negligence not to look at the will under which alone a title could be given them."

W.

NEGLIGENCE—EMPLOYER AND CONTRACTOR.

HALE *ET AL.* v. JOHNSON.*

Supreme Court of Illinois.

HON. BENJAMIN R. SHELDON, Chief Justice.
" SIDNEY BREESE,
" PINCKNEY H. WALKER,
" ALFRED M. CRAIG,
" JOHN SCHOLFIELD,
" JOHN M. SCOTT,
" T. LYLE DICKEY,
Associate Justices.

1. NEGLIGENCE—EMPLOYER NOT LIABLE FOR NEGLIGENCE OF CONTRACTOR IN PERFORMANCE OF WORK UNDER CONTRACT.—While a master is responsible for injuries arising from the negligence of his servant, a party who has contracted for the doing of certain work for his use and benefit is not liable for injuries arising during the performance of such work.

2. MASTER AND SERVANT—WHEN THE RELATION DOES NOT EXIST BETWEEN EMPLOYER AND EMPLOYED.—One who contracts to do a specific piece of work, furnishing his own assistants and executing the work either entirely in accordance with his own ideas, or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work, is clearly a contractor, and not a servant; and a person injured by his negligence in the performance of the work would have no right of action against the party for whose benefit the work is being done.

APPEAL from the Circuit Court of Cook County; the Hon. HENRY BOOTH, J., presiding.

Hitchcock & Dupee, for the appellants; *W. W. Perkins*, and *Hunter & Page*, for the appellee.

SHELDON, J., delivered the opinion of the court:

This was an action upon the case, brought by Johnson against defendants, Hale, Moss and Rowe. The declaration alleges that Rowe was erecting a building upon certain premises which he owned; that he employed Hale and Moss as his contractors and servants in such erection; that Hale and Moss employed Johnson, the plaintiff, as a day-laborer and servant upon the building, and that he was working there under their direction and control; that while he was so engaged, there was an unsafe wall on the premises liable to fall; that this was known to each of the defendants, but not to plaintiff; that Hale and Moss, with the consent of Rowe, ordered plaintiff to excavate near this wall; that while he was so laboring, through the negligence of defendants, and without any negligence on his part, the wall fell upon him and crushed his arm, which had to be amputated, etc.

A verdict was found and judgment entered against all the defendants. There was clearly error in rendering judgment against defendant Rowe.

The evidence shows that Hale and Moss were contractors, engaged in jobs of this sort; that in this case they undertook to excavate for the foundations of a building for Rowe, and were to be paid a percentage upon the cost of the labor; that they employed and paid all laborers themselves; that they alone exercised supervision of the work; that plaintiff was employed by them as a day-laborer about the work at the time he received the injury complained of. It does not appear that Rowe had any connection whatever with the excavation which was being done, after the making of his agreement with Moss and Hale, further than to pay them the stipulated price when the work was finished.

While a master is responsible for injuries arising from the negligence of his servant, it is the doctrine that a party who has contracted for the doing of certain work for his use and benefit is not liable for injuries arising in the performance of such work. Scammon v. City of Chicago, 25 Ill. 424; 2 Hilliard on Torts, p. 537, § 11; Wharton on Negligence, § 181, and cases cited by these authors. Shearman and Redfield, in their work on Negligence, in discussing the subject of who are contractors or servants, in § 77 lay it down that "one who contracts to do a specific piece of work, furnishing his own assistants, and executing the work either entirely in accordance with his own ideas, or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work, is clearly a contractor and not a servant."

We have no doubt that Hale and Moss here occupied, as to Rowe, the position of contractors, and not servants. It is not enough to charge defendant Rowe, for plaintiff to prove that he has suffered loss by some event which happened on Rowe's premises. He must also prove that Rowe violated a duty resting on him toward the plaintiff. There is no pretense of that, more than is supposed to arise from the alleged negligence of Hale and Moss or their foreman; but plaintiff having been employed by Hale and Moss, and they being contractors, and not agents or servants of Rowe, there was no privity whatever between Rowe and plaintiff. There is no ground of liability as respects Rowe.

Appellee urges that this objection should not be considered because it is raised here for the first time; that it should have been raised in the court below by demurrer, motion in arrest of judgment, or on motion for a new trial; and that, not having been so done, the objection was waived. The objection does not go to the sufficiency of the declaration, but of the evidence. While the declaration does speak of Hale and Moss as contractors, it also charges that they were servants of Rowe. All the counts allege personal negligence on the part of each defendant, which, if proved, would sustain the judgment. So that there was no ground of demurrer, or for a motion in arrest of judgment, in this respect.

As to not suggesting the objection in the motion for a new trial, one of the causes assigned under the motion was, that the verdict was contrary to the evidence. This covered it. The evidence did not support the verdict which was rendered. A motion for a new trial upon this ground having been overruled, the decision may be here reviewed.

The judgment being unauthorized as against the defendant Rowe, it must be reversed. This renders it unnecessary to consider the question as to whether there is any liability as respects the contractors, Hale and Moss. The judgment is reversed and the cause remanded.

JUDGMENT REVERSED.

* To appear in 80 Ill. Rep.

SERVICE OF PROCESS—FOREIGN CORPORATION—ACT OF MARCH 3, 1875.

STILLWELL *ET AL.* v. THE EMPIRE FIRE INSURANCE COMPANY.

United States Circuit Court, Eastern District of Arkansas.

Before HON. JOHN F. DILLON, Circuit Judge.

Plaintiffs, citizens of the State of Arkansas, brought suit against the defendant, a corporation created under the laws of the State of Illinois, on a policy issued by it in the State of Arkansas upon property there situated. A statute of this state requires every insurance company, not of the state, to file with the auditor a written stipulation, agreeing that all legal process affecting them, served on the auditor or agent within the state, should have the same effect as if served on the company; and the summons in this case was served as required by the act. *Held*, that such service was not sufficient, the defendant not being by virtue of the act an "inhabitant" of, or "found" within the state, as required by the Act of March 3, 1875.

The plaintiffs, citizens of the State of Arkansas, brought this action in this court against The Empire Insurance Company, a corporation created under the laws of the State of Illinois, to recover under a fire policy issued by the defendant in the State of Arkansas upon property therein situate, and which is alleged to have been destroyed by fire, so as, by the terms of the policy, to impose a liability upon the defendant company. The summons was served upon the local agent of the company residing at Little Rock, and also upon John Crawford, Esq., the Auditor of the State of Arkansas. By the legislation of the State of Arkansas, it is provided that "No insurance company, not of this state, nor its agents, shall do business in this state until it has filed with the auditor of this state a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company, served on the auditor, or the agent specified by the said company to receive service of process for the company, shall have the same effect as if served personally on the company within the state." Gantt Dig., § 3561, as amended, Laws 1875, p. 190. It is admitted that the summons was served as required by this act. The company has entered no appearance, and the case is before the court on a motion for a default for want of an answer.

N. & J. Erb, and *Benjamin & Barnes*, for the plaintiff; *U. M. Rose* and *E. W. Kimball*, special appearance, for the defendant.

DILLON, Circuit Judge:

By the Judiciary Act of 1789 (§ 11), it was provided that no civil suit shall be brought in the circuit court against any person, by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found, at the time of serving such process or commencing such proceeding. This provision was re-enacted, without change, in the Act of March 3, 1875, § 1. The question before the court comes precisely to this: Was the defendant company, under the facts appearing in the statement of the case, an inhabitant of, or found in this district, within the true meaning of the above provision, relating to the jurisdiction of the circuit court?

If we were not foreclosed by the decisions which have been made upon the nature and powers of corporations, and as to the effect of the Judiciary Act in question, we should feel strongly inclined to hold that the true doctrine is, that for jurisdictional purposes a corporation is a *citizen* of the state by whose authority it was created, and an *inhabitant* of any other state under whose laws it established a place of business, and, as respects suits growing out of such business, agreed, as in this case, to submit itself to the jurisdiction and laws of such state. When corporations, created by foreign governments or by other states, come into this state and establish an agency for the transaction of their business therein with the citizens of this state, justice to the latter requires that such corporations should, as respects contracts here made and acts done in the prosecution of such business, be subject to the laws and jurisdiction of the state.

The reasonableness of the provisions of the law of this state, requiring foreign insurance companies doing business therein to submit to the jurisdiction of the courts of the state, is manifest. Lafayette Ins. Co. v. French, 18 How. 404; S. C., 5 McLean, 461. But the question is, whether this has the effect to make such companies "inhabitants" of the state, or "found" within it, in the meaning of the aforementioned provision concerning the jurisdiction of this court. In view of the decisions of the supreme and circuit courts, we are obliged to resolve this inquiry in the negative. These decisions treat a corporation as strictly local and necessarily confined as to personality, so to phrase it, to the territorial jurisdiction of the state which creates it. In the leading case on this subject (The Bank of Augusta v. Earle, 13 Pet. 588), Chief Justice Taney expressly says "that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created; where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and can not migrate to another sovereignty," although it has power, when authorized by its charter and by comity, to make contracts and incur obligations in another state. This language, and the principle which it asserts, have been frequently approved by the same court in subsequent cases coming down to a quite recent date. Applying this doctrine, the circuit courts have held, under the Judiciary Act, that they could acquire no jurisdiction over the corporation of another state by service of process upon its officers passing through or found within it, on the principle that the officers are not the corporation, and finding and serving them is not equivalent to finding and serving the corporation itself. Day v. The Newark India Rubber Co., 1 Blatchf. 628.

This view is undoubtedly sound. But the same doctrine has been extended and applied to cases like the present, in which the state only allows a foreign corporation to do business on the express condition of agreeing to be sued in the state, and that such suits should have the same effect as if process had been served personally upon the corporation within the state. It was so held by an eminent judge—Mr. Justice Nelson—in Pomeroy v. The New York and New Haven R. R. Co., 4 Blatchf. 120. And the same result was reached in the Southern and Atlantic Tel. Co. v. New Orleans, etc., R. R. Co., 2 Cent. L. J. 88. This view of the law has been generally accepted and acted upon by the profession, and this is the third case in seven years in this circuit in which it has been attempted by the service of original process on the agents of foreign corporations to acquire jurisdiction over the corporations themselves.

The circuitous process has been adopted of bringing such suits in the state courts and then removing them to this court. This discloses a defect in the jurisdiction of the circuit courts; but it is one which has existed since the organization of such courts. It was not changed or remedied in the act of 1872, providing for the first time for service in certain cases out of the jurisdiction, nor by the act of 1875, which so greatly enlarged the jurisdiction of the circuit courts. The decisions to which we have referred were well known to the profession and to Congress, when the acts o 1872 and 1875 were passed; and as no change was mad

in the language of the act upon which the present question depends, the court does not feel justified in upholding the jurisdiction, however reasonable, upon principle, it might seem to it to do so.

NOTE.—Precisely the same question arose at the April Term, 1877, of the United States Circuit Court, for the Western District of Missouri, in Dallmeyer v. The Farmers, Merchants and Manufacturers Fire Insurance Co. The plaintiff in this case is a citizen of the Western District of Missouri, and the defendant is a corporation created under the laws of the State of Ohio. The plaintiff had a summons issued, directed to the marshal of the Eastern District of Missouri; and the same was served on the agent of the defendant corporation, appointed under the provisions of section 4 of the Act of the General Assembly of Missouri, approved March 23, 1874, which requires all foreign insurance companies doing business in this state, "to file with the Superintendent of the Insurance Department a written instrument or power of attorney, duly signed and sealed, authorizing some person, who shall be a citizen of this state, to acknowledge or receive service of process for and in behalf of such company in this state, and consenting that service of process upon such agent or attorney shall be taken and held to be as valid, as if served upon the company according to the laws of this or of any other state; whether such process is issued by any of the courts of this state or any of the courts of the United States, having jurisdiction within this state." * *

At the return term the defendant filed a demurrer; *first*, to the jurisdiction of the court, on the ground that the defendant was not "found" here, and was not an "inhabitant" of the district when served with the process of the court; and *second*, that the petition did not state facts sufficient to constitute a cause of action. The court sustained the demurrer as to the first ground of objection; but held that the second ground of objection,—viz., to the petition—was such an "appearance" in the case, as to place the defendant in court for all purposes, and the demurrer was accordingly overruled. The court, on this point, cited Rippstein v. The St. Louis Mutual Life Insurance Company, 57 Mo. 86. M. J. L.

HOMICIDE—DYING DECLARATIONS—WANT OF RELIGIOUS BELIEF AS AFFECTING—EVIDENCE OF UNCOMMUNICATED THREATS BY DECEASED.

STATE v. ELLIOT.

Supreme Court of Iowa, April Term, 1877.

HON. WM. H. SEEVERS, Chief Justice.
" JAMES G. DAY, } Judges.
" JAMES H. ROTHROCK, } Judges.
" JOSEPH M. BECK, } Judges.
" AUSTIN ADAMS, } Judges.

1. EVIDENCE OF DYING DECLARATIONS.—The court should not permit evidence of dying declarations of deceased to go to the jury, without first hearing evidence offered by defendant touching its admissibility.

2. EVIDENCE—PROOF OF RELIGIOUS BELIEF AS AFFECTING THE ADMISSIBILITY OR CREDIBILITY OF TESTIMONY.—Under the Statute of Iowa evidence of want of religious belief, belief in the existence of a God, or belief in a future state of existence, can only go to the credibility of testimony, and not to its admissibility.

3. EVIDENCE—UNCOMMUNICATED THREATS.—Evidence of uncommunicated threats is admissible to establish self-defense.

APPEAL from Dallas District Court.

The defendant was indicted for the murder of John N. Bold, was tried, convicted of murder in the second degree, sentenced to the penitentiary, etc., and appeals. The material facts appear in the opinion.

DAY, J., delivered the opinion of the Court:

I. No person was present at the time the wound was inflicted upon Bold, of which he subsequently died. The principal evidence against the defendant consists in the dying declarations of deceased. The state introduced T. J. Caldwell, a surgeon, who was called to attend Bold. He testified as to his condition, and his belief that his dissolution was approaching. He was then asked to state what Bold said in regard to who shot him, or who inflicted the wound on him. The defendant objected, and then offered to prove to the court, by competent testimony, that at the time of making the declarations the deceased did not believe that he was about to die, but expected to recover from the wound. And the defendant asked the court to be permitted at this stage of the proceedings to introduce his evidence touching the matters made in his offer, for the purpose of testing the competency of declarations of the deceased. The court refused to admit this testimony and permitted the declarations of the deceased to be introduced. In this action we think the court erred.

II. It is the province of the court to determine the competency of the declarations offered. In Greenleaf on Ev. sec. 160, it is said: "The circumstances under which the declarations were made are to be shown to the judge, it being his province, and not that of the jury, to determine whether they are admissible." The cases uniformly hold that the competency of such testimony is to be determined by the judge, in view of all the surrounding and attendant circumstances. McDaniel v. The State, 8 Sm. & M. 401; Hill v. The Commonwealth, 2 Black, 594; Commonwealth v. Williams, 2 Ashm. 69; Rex v. Spillsbury, 7 C. & P. 187; Rex v. Bonner, 6 C. & P. 386; Rex v. Hucks, 1 Stark. Rep. 521. The court does not discharge this duty by simply hearing the evidence produced by the state. Evidence, if offered, should be received upon the part of the defendant, and it should be weighed upon the determination of the question of admissibility. The declarations of a dying man are admitted on the supposition, that in this awful situation, on the confines of a future world, he had no motive to misrepresent; but, on the contrary, the strongest motive to speak without disguise and without malice. Rosc. Crim. Ev. 35. Before the judge decides the question of admissibility, he hears all that the deceased said respecting the danger in which he considered himself, and he should be satisfied that the declaration was made under an impression of almost immediate dissolution. It is not enough that the deceased thinks he shall ultimately never recover. Phillipps on Ev., Cowen and Hill's Notes, part 1, p. 252. In the same volume it is said, p. 253: "We see that competency is a question of fact for the courts, as in other cases. They are to find upon it as the jury do upon the main case, taking into view all the circumstances calculated to prove and disprove that despair of life, which shall be equivalent to a sworn obligation." And upon p. 254 it is said: "Upon this question of fact no rule can be adopted which will reach every variety of detail. The court try the competency of the deceased as the jury do his credibility, and the decision in either case on a conflict of testimony must be final." We are satisfied that the court ought to have inquired into all the circumstances attending the declarations, and to have heard the testimony offered by the defendant, before determining that the declarations were competent and permitting them to go to the jury.

III. The defendant offered to prove, as affecting the *admissibility* of the declarations of deceased, that he was a materialist and that he believed in no God or future conscious existence. The proffered proof was not competent for the purpose of affecting the *admissibility* of the dying declarations. If Bold had been alive, he would have been a competent witness, although a disbeliever in God and a future state. "Every human being of sufficient capacity to understand the obligation

of an oath is a competent witness in this state." Code, sec. 3636.

IV. The defendant, however, when he came to make out his defense, offered to prove the foregoing facts as affecting the *credibility* of the declarations of deceased, and the evidence was not admitted for this purpose. In this there was error. Under the common law, persons, insensible to the obligation of an oath from defect of religious sentiment and belief, were incompetent to testify as witnesses. The very nature of an oath presupposes that the witness believes in the existence of an omniscient Supreme Being, the rewarder of truth and avenger of falsehood. Atheists, therefore, and all infidels, that is, those who profess no religion that can bind their conscience to speak truth, are at common law rejected as incompetent to testify. 1 Greenleaf, sec. 368. Our Code, sec. 3637, provides: "Facts, which have heretofore caused the exclusion of testimony, may still be shown for the purpose of lessening its credibility." If Bold had been offered as a witness, it is very clear that the proffered proof would have been competent for the purpose of affecting his credibility. But dying declarations are open to direct contradiction in the same manner as any other part of the case for the prosecution; and the prisoner is at liberty to prove that the deceased was not of such a character as was likely to be impressed with a religious sense of his approaching dissolution, and that no reliance is to be placed on his dying declarations. Roscoe's Crim. Ev. p. 35.

V. Against the objections of defendant, the court permitted an affidavit made by John N. Bold before Lemuel Warford, a justice of the peace, to be offered in evidence. The evidence shows that Bold gave Warford the substance of the affidavit, and Warford shaped it. About two-thirds of it is in the language of Bold, and the balance of it is in the language of Warford. It was not read over to Bold before he signed it. As the statement was neither the language of deceased, nor read over to him before he signed it, we think it was inadmissible.

VI. The court rejected proof offered by defendant, tending to show that Bold had poisoned defendant's flour, attempting thereby to poison defendant and his family. We think there was no error in rejecting this testimony.

VII. The court refused to permit defendant to prove acts and conduct of defendant, showing that he was very much afraid of plaintiff, and sought to get away from and avoid him. There was no error in this ruling.

VIII. Evidence of threats made by deceased against the defendant, but not communicated to defendant, was rejected. There was proof of threats, however, which were communicated, which brings the case fully within the principle of State v. Woodson, 41 Iowa, 424, and renders the ruling, if erroneous, error without prejudice.

But as the question will probably arise upon the retrial, we deem it proper to determine it now. The decided weight of authority holds that threats uncommunicated are inadmissible. See Com. v. Ferrigan, 44 Penn. 386; Newcomb, v. State, 37 Miss. 383; Powell v. State, 19 Ala. 597; Coker v. State, 20 Ark. 52; Atkins v. State, 16 Ark. 568; Lingo v. State, 29 Ga. 470; State v. Dumphey, 4 Minn. 438; State v. Gregor, 12 La. An. 473; State v. Jackson, 17 Wis. 44. The only exception to the rule seems to be, that where evidence had been given, making it a question whether the defendant had perpetrated the act in defense of his person against an attempt to murder him or inflict some great bodily harm upon him, violent threats, made by deceased against the defendant a short time before the occurrence, may be proved, though not communicated. Stokes v. The People, 53 N. Y. 164.

The threats, offered to be proved in this case, do not fall within this principle. We think they were properly rejected.

For the errors discussed, the judgment is

REVERSED.

NOTE.—*Apropos* the case of Wiggins v. The People, 4 Cent. L. J. p. 348, the above case will be of interest upon the question, as to the admissibility of evidence of uncommunicated threats by a deceased person, on trial of a defendant charged with his murder, as going to the question of who committed the first assault. In this case there were no eye-witnesses. The defenses were: First, a denial of the killing; second, self-defense; third, insanity. The supreme court hold the evidence to be admissible for that purpose; but for some unexplained reason were mistaken as to the facts of this particular case. With all deference to the views of the learned critic in the note to the case above referred to, we believe the evidence unobjectionable for all reasons. The question of who first assaulted in such cases is always in issue; such evidence is in the nature of a declaration of a party to the action, and is supported by the same grounds. The state prosecutes in the stead of the deceased person. In no forced sense may it be considered part of the *res gestæ*. But a stronger argument is one *ex necessitate rei*. It is the best evidence in such cases that can be produced, and justice must not fail. It has all the requisites of moral certainty. There is nothing in our opinion against its admissibility. Its weight is for the jury. The learned critic says: "If this evidence was properly admissible, why is not any other hearsay testimony, indicating that the deceased was more likely to make an attack on the defendant than some other person would be?" But that is the question. Is it in the nature of hearsay? Is it not the best, most direct evidence of a collateral fact or circumstance (that the deceased at or a short time prior to the encounter was seeking the defendant's life), which renders it the more probable that the defendant was only acting in his own defense? For all purposes of the trial, it is a question whether deceased was at fault, or defendant. If the deceased was at fault, the defendant is not guilty; if the defendant, he is. The evidence of threats made by defendant would certainly be admissible; for the same reason, why not like threats by deceased? In the one case they are admitted, not *because* they are declarations of the defendant *and bind him*, but because they do evince his existing attitude of mind. And when this is material, *any other* facts pointing to the same conclusion are equally as competent. The badges of hearsay are wholly wanting; for the witness who hears the threats is upon the stand. Let us repeat, the jury are to determine *which party is in fault*; and for this purpose no evidence attainable can be more direct and certain than this. J. B. W.

INJURIES RESULTING IN DEATH—ACTION FOR, GIVEN BY STATUTE, NOT TRANSITORY.

McCARTHY v. CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

Supreme Court of Kansas, January Term, 1877.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

1. INJURIES RESULTING IN DEATH—ACTION NOT TRANSITORY.—Where M is an inhabitant of this state, and is injured in the State of Missouri by the wrongful acts of a railway company operating a railroad in the latter state, and thereupon is brought to this state, and dies here from the effect of such wrongful acts: *Held*, that the personal representative of the intestate, appointed under the laws of this state, can not maintain an action therefor in this state against such railway company under section 422 of the civil code.

2. SECTION 422, OF THE CIVIL CODE, Genl. Stat. 1868, page 709, has no extraterritorial force, and does not confer a right of action for an injury inflicted in another state.

Taylor & Gillpatrick, for plaintiff in error; *M. A. Low*, for defendant in error.

DEMURRER to petition.

HORTON, C. J., delivered the opinion of the court:

The action was brought by the plaintiff as administrator of Michael McCarthy, deceased. The petition alleges that the plaintiff is the duly appointed and qualified administrator of said intestate; that the defendant is and was a railroad corporation, organized and existing under and by virtue of the State of Illinois, and was and is engaged in operating the Chicago and Southwestern Railroad,—a road leading from the City of Leavenworth, Kansas, across the Missouri River bridge; thence east through Platte County, Missouri. That the intestate, on June 5th, 1873, while in the employ of defendant as a track-repairer on its road, received personal injuries in the County of Platte and State of Missouri, through its gross and culpable negligence, of which injuries McCarthy died in twenty-four hours; that the intestate, at the time of his employment by said defendant, and at the time of his death, was a resident of this state; that the services were to be performed on the road defendant was operating and controlling; that, immediately after the injuries complained of were received, the intestate was brought from Platte County, Missouri, to his home in Leavenworth City, in this state, where he died. The petition further alleges that the intestate left Margaret McCarthy as his widow, and eight children, giving the name of each, and also states that, by reason of the premises, the plaintiff claims damages in the sum of $10,000. The defendant demurred, and assigned the following grounds of objection:

1. That the court did not have jurisdiction of the subject-matter of the action.

2. That the plaintiff did not have legal capacity to sue.

3. That the petition did not state facts sufficient to constitute a cause of action in favor of the plaintiff against the defendant.

The court sustained the demurrer, and the plaintiff electing to stand by his petition, final judgment was rendered in favor of defendant. To reverse the judgment of the court below, a petition in error has been filed in this court.

The suit is based on section 422 of the Civil Code, Gen. Stats. 1868, pp. 708, 709, and the first question presented is, whether this provision of our statute has any extraterritorial operation? In other words, does this statute apply where the suit is brought in this state for an injury done in another state? This question has been before the courts of various states, upon petitions like the one filed in this case, and almost invariably the courts have held that the statutes of a state have no force beyond the limits of the state of their adoption. Generally all laws are co-extensive, and only co-extensive with the political jurisdiction of the law-making power. This identical subject is fully discussed and decided against the claim of the plaintiff in error in the following cases: Campbell v. Rogers, 2 Handy, 110; Vanderwerken v. The N. Y. & N. H. R. R. Co., 6 Abb. Pr. 239; Beach v. The Bay State Steamboat Company, 30 Barb. 433; Whitford v. The Panama R. R. Co., 23 N. Y. 465; Nashville and Chattanooga R. R. Co. v. Eakin, Admr., 6 Cold. (Tenn.) 582; Needham v. The Grand Trunk Railway Co., 38 Vt. 294; The Selma, Rome & Dalton R. R. Co. v. Lacy, 43 Ga. 461; Hover v. The Pennsylvania Company, etc., 25 Ohio St. 667.

In the states where the above decisions were rendered, statutes similar to the provisions of section 422 are in force.

At common law this action could not be maintained. In the first place, if the death was caused by a felony, any action for a civil remedy for it would be merged in the criminal prosecution, or rather, suspended till the conclusion of the criminal action; and as the punishment for a felony, causing death, was the death of the offender and the forfeiture of his property, the suspension of the action really resulted in its defeat. Higgins v. Butcher, Yelv. 89; Marsh v. Stone, 6 B. & C. 551, 557, 564. In the second place, the rule that a personal action dies with the person, which was always regarded as applicable to personal torts, operated to abate any cause of action that might otherwise have belonged to the injured party, and this applied equally to deaths by felony, negligence or misadventure. No claim then can be maintained in favor of the action brought upon any rule of the common law, and it is not necessary, in reaching this conclusion, to hold that the doctrine expressed in Baker v. Bolton, 1 Campb. 493, that, "in a civil court, the death of a human being can not be complained of as an injury," has authoritative force in this country, in those states where there is no statute for damages sustained by a husband, parent, master, etc., through the death of a deceased, when the party suing is entitled to the services of such person.

It is contended by the counsel for the plaintiff, however, that, confessing the full force of the limitations upon the operation of the laws of the state, so far as any extraterritorial power is concerned, and assuming that, by the common law, the cause of action which accrued to plaintiff's intestate died with him, yet, the action is maintainable, and the demurrer should have been overruled, as the court will presume, in the absence of allegations in the record to the contrary, that the laws of Missouri, in respect to actions of this character, are like our own.

Admitting the premises, the conclusion does not necessarily follow. Every statute of another state, giving a right of action, can not be enforced in a spirit of comity in this state, even if such statute is set forth in the petition filed in the court; and a very different principle is involved between presuming the laws of sister states, like our own, to sustain title to property within this state in litigation, and holding that the laws of other states are similar to ours in enforcing through our courts either the penal or remedial statutes of such other state. In Massachusetts, where the rule of the common law is in force, it has been decided in a case where the intestate was an inhabitant of the state, but injured in New York, which state has a statute similar to our own, and the statute law of New York was set forth in the declaration, that the action could not be maintained. Judge E. R. Hoar, in discussing the right of action and the New York statute, in the opinion, says: "How can it be regarded as anything else than a statute penalty which the personal representative of the deceased is to recover by an action; which is limited in amount, although that amount may be much less than the extent of the injury sustained by these, whose loss is to be estimated in computing it; and which is to be distributed among the parties entitled to receive it,—not in proportion to the injuries which they have respectively sustained,—but in proportion to the shares to which they would be severally entitled in the distribution of an intestate estate? We do not readily find a satisfactory answer to this question." Richardson v. N. Y. Central R. R. Co., 98 Mass. 85.

In Ohio it has been decided that, where a person, who was a brakeman on the M. S. & N. I. R. R. Co., was killed in Cook County, Illinois, by the negligence of the railroad company; and where the statute of Illinois, which is like ours, was set out in the petition, and the same was very similar to that of Ohio, an administrator appointed in Ohio could not maintain in that state an action for damages for the benefit of the widow, or next of kin of the deceased. Woodard, Admx., v. The M. S. & N. J. R. R. Co., 10 Ohio St. 121.

We think it is to be assumed on the petition, in the

absence of more definite allegations, that the plaintiff was appointed administrator in this state. Many difficulties present themselves in holding that an administrator, appointed under the laws of Kansas, can undertake and discharge a trust of this character conferred by the laws of Missouri. The plaintiff is not amenable to the courts of Missouri; yet, if this action is maintainable, the money is to be recovered here, upon the laws of another state, by a person acting in an administrative capacity under the authority of this state, and the fund is then to be distributed by the laws of the sister state. It is doubtful whether an administrator's bond would extend to such a case, or whether this action would be a bar to other proceedings in Missouri to recover damages for the injuries resulting in the death of the intestate.

In the Ohio case cited, Judge Gholson says: "The jurisdiction of the court, under which he (the administrator) acts, does not extend to trusts carried out in pursuance of the laws of other states; for it may well happen that the next of kin, under the law of Illinois, may not be the same persons, or take in the same proportion as under the law of Ohio. Certainly, to determine who are the *cestui que trusts*, the laws of Illinois must be regarded, and it is therefore the intention of the statute of that state, that the tribunal under which the personal representative, in whom the right is vested and upon whom the trust is imposed, is acting, should administer the trust and distribute the fund among the proper parties."

We think this reasoning sound, and applicable to the case at bar. We can not presume that the laws of Missouri give an administrator of Kansas power to collect moneys under its laws, to administer trusts imposed by its authority, and to distribute funds among the proper parties to whom the same belongs by the statutes of that state.

If the laws of our state are to be presumed in force in Missouri, then there was no necessity to institute an action, so circuitous as this one must be, if maintainable here, in this state, as the administrator could have brought the action in the courts of Missouri. Kansas Pacific Railway Co. v. Cutter, 16 Kans. 568. As a fact, *aliunde*, the laws of Kansas and Missouri are very dissimilar; and the plaintiff, even if a Missouri administrator could not, under the laws of the latter state, maintain any action in that state as the personal representative of the intestate on account of the injuries which caused his death. In that state, the damages in such actions must be sued for and recovered,—first, by the husband or wife of the deceased, or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased; or third, if such deceased be a minor and unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment, or, if either of them be dead, then by the survivor. Wagn. Mo. Stats. 1872, vol. 1., 519–520.

We do not pass upon the question, whether an administrator, appointed under the laws of a state having similar provisions of law to section 422 of the code, might or might not maintain an action of this character in this state for the purpose of recovering a fund to be distributed under the law of the state from whence he derives his appointment. Such a case is not presented in the record. It is claimed that, whatever construction this court may give to sec. 422, plaintiff's cause of action is supported by section 420 of the code, Gen. Stats. 1868, p. 708. It reads as follows: "In addition to the causes of action which survive at common law, causes of action for mesne profits, *or for an injury to the person* or to the real or personal estate, or for any deceit or fraud, shall also survive, and the action may be brought, notwithstanding the death of the person entitled or liable to the same."

The plaintiff has declared on the cause of action given by section 422, and not on that given by section 420; but if sufficient facts were contained in the petition, so that section 420 could be considered, we do not think the position of the plaintiff would be any better to sustain his claim. Section 422 was originally passed on February 8, 1859, under an act authorizing actions to be brought in certain cases. Comp. Laws, 1862–80. Section 420 was section 410 in the code of 1859, but both of these provisions of law took effect on the same day, viz., June 1, 1859. In the revision of 1868, these sections were embodied in the civil code as sections 420 and 422, are a part of the same act, and were adopted at the same time. They must be construed *in pari materia*. The purpose of section 422 is, evidently, not only to fix the amount of damages and limit them to the use of the widow and children, or next of kin, but to take away the right of the administrator to sue for the benefit of the estate generally, where death resulted from the injuries. Section 420, as construed with section 422, only causes the actions to survive for injury to the person, when the death does not result from such injury, but does occur from other circumstances. The right of the action under section 422 is exclusive, and an administrator could not maintain an action under sections 420 and 422 for the same injury. When death results from the wrongful acts, section 422 is intended solely to apply. Read v. The Great Eastern R. R. Co., 3 Q. B. 555; Andrews v. Hartford R. R. Co., 34 Conn. 57.

The fact, urged with considerable stress by the counsel of plaintiff, that the intestate lived in Kansas at the time of his employment, and died in this state, is immaterial in the decision of the questions presented. The wrongful acts were all committed in Missouri. This court has already held, that while section 422 gives a cause of action in every case coming within its terms and happening within the state, the residence of the deceased is not material, and the place of his death unimportant in determining the right of the administrator to sue. Kansas Pacific R. R. Co. v. Cutter, *supra*.

The judgment of the District Court will be affirmed. All the justices concurring.

JUDGMENT AFFIRMED.

BOOK NOTICES.

BOOKS RECEIVED.—The Statutes of Indiana. Revision of 1876, in two volumes. Edited by Edwin A. Davis, LL.B., author of Davis' Indiana Digest, etc. Indianapolis: Bingham & Co.; Newell, Hubbard & Co.; Cincinnati: Robert Clarke & Co.——United States Supreme Court Reports. Volume 93. Reported by William T. Otto. Vol. III. Boston: Little, Brown & Co.

A COMMENTARY ON THE LAW OF EVIDENCE IN CIVIL ISSUES. By FRANCIS WHARTON, LL.D., author of Treatise on Conflict of Laws, Medical Jurisprudence, Negligence, Agency and Criminal Law. In two volumes. Philadelphia: Kay & Brother. 1877.

It is a gratifying fact that, while the law is expanding and becoming really more complex by extension and application to a great number of details which formerly were either not noticed in general estimates, or had no existence, it is, in certain of its departments, assuming a greater simplicity. This augmented simplicity has been particularly remarkable of late years in the law of Pleading, Practice, Admiralty and Evidence. It might be said, in a general way, that while the law defining rights has become more particularized, and hence more difficult to comprehend and retain in all of its minute applications, a certain compensation

for the present has been found in the rapid simplification of that part of the law which pertains to remedies. Not a few books that were of high authority and in constant requisition on the subjects of pleading, practice and evidence a few years ago, have been laid on the shelf, and are now rarely referred to unless to show the origin of some derivative principle. The difference between the presentation and trial of causes brought about by recent changes in the law governing such matters, might be easily apprehended by an unprofessional observer of tolerable acuteness. Under the former system the orderly arrangement of the troops seemed to be rather more important than the real battle that was to follow. Volumes were required to show whether some long consecrated and talismanic word or phrase might be safely omitted from a pleading, or whether it was, in the particular case before the court, introduced in the proper manner, in the proper place, or with the proper surroundings. In like manner much learning was required to show whether a witness was interested in the event of the suit in which he was called to testify, whether his interest was direct, contingent, or remote, or whether it was not balanced by some countervailing interest. In the latter case, the witness was supposed to be in the position of the ass so often referred to, which, being placed between two sacks of oats, at equal distances, could have no inducement to select either in preference to the other, and was therefore in a state of profound indifference. As these questions pertaining to interest were often of considerable intricacy, the unlettered witness, the probabilities of whose moral condition were so finely and freely discussed, must often have been not a little puzzled to know what it was that enabled him to tell the truth, or prevented him from saying anything. He might, however, enjoy the odd satisfaction of seeing a cause tried by rules which excluded the testimony of every one who knew anything about the matter in dispute; though he, perhaps, would not be pleased at the low estimate of his moral nature, which implied that he might swear falsely rather than risk the loss of a few cents about which he had never thought, and which, in all probability, he would never acquire; nor would he, perhaps, have a very high opinion of that sordid philosophy which took no notice of any interest except one that was strictly pecuniary. These discussions and these anomalies that once filled so much space in works on evidence, and consumed so much of the time of the courts, are things of the past. It is possible that there is more false swearing than there was formerly; but even this is by no means certain. The amount of false swearing that is done may be supposed to bear some sort of ratio with the number of those who are sworn. Under the old system, from the exclusion of interested witnesses, it was necessary often to prove many collateral facts, from which a pertinent inference might be drawn;—and thus many witnesses were introduced concerning some fact which a party to the suit, or some other disqualified witness, might have settled to the satisfaction of every one by a word. Hence many more witnesses were sworn, on the whole, than at present; and amongst them were those who concealed some disqualifying interest, and who had stronger motives to bias their language than the pecuniary interest upon which alone the law fastened its peremptory judgment.

In addition to the change in the law which takes away the disqualifications of parties and witnesses, our author mentions the following changes in the law which have effected changes in the law of evidence: The disuse of special pleading, and the almost unlimited amendment in civil issues, which have rendered so many of the old decisions on variance useless; the application of equity rules to common-law cases; the reception of more liberal views with regard to the relevancy of evidence; and the gradual, but somewhat rapid decay of arbitrary presumptions. All of these changes have been in fact brought about by the substitution of the free logic of Bentham and Mill in the place of the formal rules of the scholastic dialectics, which seemed to suppose that the truth was a thing not to be apprehended in itself, but only through certain representatives to which a character of absolute or approximate infallibility was attached.

The present volumes are designed to meet these changes; consequently they are indicated in a striking manner. Familiar chapters in the old books—old only as regarding the progress made in the law—are looked for in vain. They have passed quite away and forever. The space which they occupied is given up to decisions that show forth the law as it stands at this time. Any one who knows the value of the adjudications of late years on questions of evidence presented by the new laws, will readily perceive the value of the present work, which not only disencumbers the law of a large amount of useless matter, and gives place to new matter, but illuminates the whole subject with lights from what may be considered as a new philosophy at present pervading alike the statutes and the decisions. The chapters of our author on the nature of proof, relevancy and presumptions must be regarded as being contributions to legal science of unusual value. We have never had any complaint to make of the style of our author; but we think that the style of the present work is superior to that of his former treatises, insomuch as it shows an increased power or will to condense what he has to say. We are very decidedly of the opinion that this compression adds to the clearness and distinctness of the execution of the work. U. M. R.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE STATE OF WISCONSIN, with Tables of the Cases and Principal Matters. By O. M. CONOVER, Official Reporter. Vol. 40. Chicago: Callaghan & Co. 1877.

This is a volume of 750 pages, containing the decisions of the Supreme Court of Wisconsin, delivered at the January and August terms, 1876. Ninety cases are reported here, some of them of great interest and importance. Among these are the celebrated insurance cases, involving the right of a state to prescribe conditions upon which an insurance company may transact business within its borders; and the case, an abstract of which we append, relating to the effect of the statute abolishing uses and trusts upon charitable trusts. Three of the cases reported in this volume have been already published in this journal, viz., Heiss v. Murphy, 3 Cent. L. J. 639, upon the doctrine of *cy pres* in Wisconsin; State v. Wilner, *ib.* 715, as to the defense of insanity in criminal cases; and Ahnert v. Zaun, *ib.* 769, in regard to the suspension of statutes of limitations during the war. The work of both reporter and publisher is excellent.

MUNICIPAL CORPORATIONS — WHEN LIABLE FOR TRESPASS.—*Hamilton v. City of Fond du Lac.* Opinion by LYON, J., p. 47. 1. For acts constituting a trespass, done by direction of city officers who had authority to act upon the general subject-matter, and acted in good faith, with an honest desire to obtain for the public a lawful benefit, the city is liable. 2. The council of a city being empowered to abate nuisances, and also to straighten, widen, and otherwise improve the bed or channel of either branch of a river within the city limits, passed an ordinance declaring one branch of said river within said limits a public nuisance, and providing for its abatement by the excavation of a new channel across plaintiff's premises. Afterwards, pursuant to a contract let by the board of

public works of said city in its name, for the excavation of said new channel, acts were done by the contractor constituting a trespass on plaintiff's premises. The court held that the city was liable; the action of the council being within the scope of its general powers, and taken in the belief that it was exercising a lawful power for the public good. The principle upon which this case depends was laid down by this court in Hurley v. Texas, 20 Wis. 634, and in Squiers v. Neenah, 24 Wis. 588, to the effect that, if the trespass complained of is within the general authority of such officers or agents, the city is liable. In thus holding, the court adopted the rule on this subject laid down by Shaw, C. J., in Thayer v. Boston, 19 Pick. 511. The same rule was sanctioned by the New York Court of Appeals in Lee v. Sandy Hill, 40 N. Y. 422; see also Crossett v. Janesville, 28 Wis. 420.

WILLS—CHARITABLE TRUSTS—EFFECT OF STATUTE ABOLISHING USES AND TRUSTS. *Ruth v. Oberbrunner et al.*, p. 238. Opinion by COLE, J. 1. Section 1, chapter 84, of the Revised Statutes of Wisconsin, which abolishes all uses and trusts within the state except those specifically authorized by the chapter, held to apply to *charitable trusts*. 2. A devise of land to A. & B., "to hold the same in trust for the use and benefit of the order of St. Dominican and St. Catherine's Female Academy—and for no other purpose—which is located in the City of Racine, in the State of Wisconsin," can not be sustained under sub-division 5, sec. 11, of said chapter, because the trust is not "fully expressed and clearly defined upon the face of the instrument." 3. The trust being a mere passive one is not authorized by the other provisions of said chapter. 4. If, when the will took effect, the order of St. Dominican and St. Catherine's Female Academy had been incorporated and empowered to take and hold the legal estate in said lands, such legal estate would have vested in them under the statute. But neither of them having been incorporated at that time, nor until after the commencement of this action by the testator's heirs to recover the land, the devise is void. The question to be decided in this case was rendered difficult by the different views entertained in regard to the origin of equity jurisdiction over charities; some holding that it was almost entirely founded on the statute of 43 Eliz., while others claim that this statute "was not introductory of any new principles, but was only a new and less dilatory and expensive method of establishing charitable donations, which were understood to be valid by the laws antecedently in force." Denio, J., in Williams v. Williams, 8 N. Y., 525, 542. Mr. Spence, in his work on Equitable Jurisdiction (vol. 1, p. 587), while speaking on this subject, observes that "when gifts of personal estate were made by act *inter vivos* to persons capable of taking for definite charitable purposes or uses, and when lands, or the use of lands, were by deed or will directed to be applied for the like purposes, the court of chancery, apparently under its general power to enforce the performance of trusts, entertained jurisdiction of trusts of this description equally as of private trusts. Where there was no trustee, or where there was a trustee and the trust was indefinite, as for the poor generally, if applications to the court of chancery were ever made and sustained, as some high authorities have maintained, it must have been at the instance of some person on behalf of the king as *parens patriæ*; but there is no memorial, at least amongst the records that have yet been published, or to be discovered from the searches that have been made in the repositories of the court, of any information on behalf of the crown to the court of chancery for such a purpose before the time of Elizabeth." He closes his remarks by saying: "There was nothing to exclude the court of chancery from exercising its authority under its general jurisdiction for compelling trustees properly constituted to apply the rents and profits of charity estates according to the trust reposed in them. It seems, however, that no bill could have been sustained to establish a charity which was *void at law* for want of sufficient devisee, prior to the statute 43 Eliz." See, also, 2 Story's Eq. Jur., ch. 32; 2 Kent, 363, *et seq.*; Vidal *et al.* v. Girard's Ex'rs, 2 How. (U. S.), 127; Fontain v. Ravenel, 17 *Id.* 369; Williams v. Williams, *supra;* Owens v. Missionary Society, 14 N. Y. 380; Beckman v. Bonsor, 23 *Id.* 298, 575; Levy *et al.* v. Levy *et al.*, 33 *Id.* 97; Bascom v. Albertson, 34 *Id.* 584; Holmes *et al.* v. Mead, 52 *Id.* 332. It may be admitted that this devise would be sustained in England, and by some courts in this country where the doctrine of *cy pres* prevails. But the concession does not obviate or remove the serious objections taken to it under our statutes. By sec. 1, ch. 84, R. S., it is enacted "that uses and trusts, except as authorized and modified in this chapter, are abolished; and every estate and interest in lands shall be deemed a legal right, cognizable as such in the courts of law, except when otherwise provided in this title." By the next two sections, every estate held as a use was confirmed as a legal estate; and any person who, by virtue of any grant or devise, was entitled to the actual possession of lands and the receipt of the rents and profits thereof in law or equity, must be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interest. And section 5 provides that every disposition of lands, whether by deed or devise, shall be directly to the person in whom the right to the possession and the profits shall be intended to be vested, and not to any other to the use of or in trust for such person; and if made to one person for the use of another, except as otherwise provided in the chapter, no estate or interest, legal or equitable, shall vest in the trustee. The first inquiry is, whether there is any ground, in view of the well-settled rules of construction, for introducing an exception in the statute, and for holding that it does not include charitable uses and trusts in lands. "Uses and trusts, except as authorized and modified in this chapter, are abolished." These are the words the legislature has used in enacting the law. They are plain, broad and explicit. They apply to all trusts and uses. The legislature has spoken; it has used words which include public and charitable trusts and uses, as well as private trusts; and the intent of the legislature must prevail. The statute was evidently an attempt on the part of the legislature to revise and codify the law of uses and trusts; including, it would seem, within clearly prescribed regulations, charitable uses as well as other trusts. It must therefore be held that all trusts, except those specifically authorized and saved by the subsequent provisions of chapter 84, are abolished by the first section. This result fully accords with the rule recognized by this court, that a statute which revises the subject-matter of a former statute works a repeal thereof, without express words to that effect. Lewis, Gov., v. Stout *et al.*, 22 Wis. 234. The Wisconsin Statute of Uses and Trusts is copied from the statute of New York. A great diversity of opinion has prevailed in the courts of that state on the question whether charitable uses were included in its provisions. In Potter v. Chapin, 6 Paige. 640-650, decided in 1837, there is a strong intimation by the chancellor that, under the Revised Statutes, a devise of real estate could only be made to a person capable of holding the same for the purposes of the charity, and that "all general trusts are abolished." It was not necessary, however, in that case to decide the question. In Shotwell, Ex'r, etc., v. Mott *et al.*, 2 Sandf. Ch. 46, de-

cided in 1844, Vice-Chancellor Sandford held that the article of uses and trusts only related to private trusts, and that public trusts and charitable uses were excepted from its provisions. One consideration which seems to have had influence on the mind of the vice-chancellor and led him to this conclusion, was the fact that the revisers, in their notes accompanying the article when it was submitted to the legislature, did not say one word upon the subject of charitable uses. Had the revisers proposed sweeping and radical changes in the existing law of uses and trusts, the vice-chancellor thought they would have stated their reasons and objects fully and elaborately. This suggestion or argument is considered and quite effectually disposed of by Mr. Justice Duer (himself one of the revisers, as is well known), in the case of Ayres v. The Methodist Church, 3 Sandf. S. C., 351-372, decided in 1849, where a full and exhaustive review of the subject and the history of charitable trusts both in England and this country will be found, and from which it will be seen that the later and better doctrine of the Court of Appeals of that state is, that "the sweeping provisions of the revised statutes, abolishing all uses and trusts except those specially named, are sufficiently general and comprehensive to include all charities; and, if these are saved, it must be by some exception expressed in or implied from the terms of the statute itself." The express trusts retained by the New York statute are four in number, and are active trusts for special temporary purposes in the interest of individuals. Downing v. Marshall, 23 N. Y. 336; Holmes v. Mead, *supra*. The statute of Wisconsin contains a provision in regard to that class of trusts, not found in the statutes of that state. It is the 5th subdivision of section 11, and reads as follows: "An express trust may be created for the beneficial interests of any person or persons, when such trust is fully expressed and clearly defined on the face of the instrument creating it, subject to the limitations as to time prescribed in this title." Upon the argument it was attempted to sustain the bequest under this section. But the court say: "Instead of the trust being '*fully expressed and clearly defined*,' there is a fatal uncertainty about it in every particular. The trust not only fails to impose any active duty upon the trustees, but it fails to designate any special purpose to which the income of the property is to be applied. The property is to be held for the use and benefit of the *cestui que trusts*. It need not necessarily be devoted to a charitable use. Suppose the profits of the real estate should be applied to the payment of taxes, to the erection or repair of buildings upon it, or to any purpose which would promote the pecuniary interests of these unincorporated associations, would this be a violation of the trust? Apply another test. Suppose a bill were filed to compel the trustees to execute the trust, what could the court order the trustees to do? Would it not be compelled to resort to the *cy pres* doctrine, establish a trust or frame a scheme to carry out the charitable intent of the testatrix, where she had given no directions, and had declared in the will no charitable purpose? It seems to us this course would be inevitable. The title of the trustees under the will is merely nominal, connected with no power or duty in respect to the management or disposition of the estate, and is unlike the trust created in Goodrich v. The City of Milwaukee, 24 Wis. 422. In the case of Owens v. The Missionary Society, *supra*, there was a bequest "to the Methodist General American Missionary Society appointed to preach the gospel to the poor, L. C.," a voluntary association then existing. One question considered in the case was, whether the bequest was accompanied by a trust, so that, if the society obtained the fund, it would be bound to appropriate it to some pious or charitable use. Upon that point Mr. Justice Selden says: "If, then, a bequest, unaccompanied by any designation of the purposes to which it is to be applied, be made to a society whose name and public acts indicate that its objects are religious or charitable, is there an implied trust which limits the use to such objects? When the bequest is to a corporation, there would seem to be some basis for such an implication, because, the objects, purposes and powers of the corporation being in all cases more or less clearly defined by its charter, the bequest may fairly be presumed to have been intended for those specific objects. But we have no such criterion for ascertaining the nature and purpose of a voluntary association. Those purposes may change with the will of the associates. They may be pious to-day, and impious to-morrow. There is no law to prevent or restrain such changes. It is difficult to see, therefore, how a bequest to such an association can be deemed to create a 'charitable use,' unless the purpose to which it is to be devoted is pointed out by the testator." pp. 385-6. After this distinct intimation of his opinion on the question, the learned judge assumes, for the purposes of the case, "that where a bequest is made to an unincorporated society, whose general objects are known to be, as its name indicates, religious or charitable, a *trust is implied* that the fund shall be devoted to those objects." In that case the bequest was declared invalid on account of the incapacity of the association to take, and the court held that it could not uphold it for a charitable or religious purpose. No importance can be attached to the act of incorporation obtained subsequent to the commencement of the action. Owens v. Missionary Society, 14 N. Y. 380; White v. Howard, 46 N. Y. 144.

NOTES OF RECENT DECISIONS.

COSTS IN BANKRUPTCY PROCEEDINGS—PRIVILEGED CREDITORS. *In re Sawyer.* United States District Court, District of Massachusetts. From original opinion of LOWELL, J. The account rendered in this case brings to view one of the weak points of this, as of all the bankrupt laws, the temptation which assignees are under to exhaust the assets in unwarrantable charges. I wish it to be distinctly understood that it is the duty of the registers to examine and regulate the charges, whether any creditor takes the trouble to object to the account or not; and to see that, when the account is correct, a dividend is paid. I had supposed this was well known; but this account seems to have lain in the register's office for some months without action. The assignees in this case have received about $6,000, and the charges for legal services are about $2,000, and for the assignees themselves, $1,200. These are all disallowed. For their services the assignees may have the commissions established by the rule of the supreme court, and no assignees are ever to have more, without my order, as I have already decided. For counsel fees I allow the sum of $200. I disallow the item of $100 paid to the register's clerk. The bill will be reformed by the clerk on this basis, and a dividend will be paid forthwith, to the privileged creditors, of the amount in the hands of the assignees, as found upon a proper account. In this case the debts, not exceeding $50 each due the workmen, are more than enough to absorb the fund. And I wish to repeat what I said at the hearing, that when there are debts due workmen which are privileged, the assignee has no moral right to stake their money in litigation for the supposed benefit of the general creditors. If the latter want litigation, they must pay for it. In future I shall allow no counsel fees in such a case, until the privileged debts are paid in full. I do not think it necessary in most cases

that the workmen should be put to the expense of proving their debts, and the estate to the very considerable cost of paying their dividends in due and regular form. If the general creditors agree, the assignee may pay these, out of hand, as soon as he receives enough money for the purpose; or may pay a part equally among them. The assignee, no doubt, is entitled to the protection of a proof, if he requires it; but he will not often find it essential to his safety. Account to be reformed.

NON-RESIDENCE—SERVICE BY PUBLICATION. *Collinson v. Teal et al.* United States Circuit Court, District of Oregon. From original opinion of DEADY, J. A person temporarily residing or sojourning at Honolulu, as United States Commissioner to the Hawaiian government, is a non-resident of the state within the meaning of sub-division 3 of § 30 of the code of 1854, authorizing the service of summons by publication in certain cases where the defendant is not a resident of the territory. This section of the code provides that service of summons may be made upon a defendant by publication, among others, in the following case: "When the defendant is not a resident of the territory, but has property therein, and the action arises on contract, and the court has jurisdiction of the subject of the action." Literally, a resident is one who sits, abides, inhabits or dwells in a certain place. A person *sojourning*—which is only a synonym for residing—at Honolulu, is *prima facie* residing there, and can not be a resident of Oregon at the same time. The word is of a narrower signification than domicile, and like the word *inhabitant* implies a bodily presence. Considered with reference to the purpose of the statute—the mischief to be remedied—its meaning is the same. It was enacted to give this class of creditors, whose debtors were absent from the state and could not therefore be personally served with process within it, a means of enforcing their securities and so far collecting their debts. In Roosevelt v. Kellogg, 20 Johns. 210, the court held that an averment in a plea of discharge under the insolvent act, that the insolvent was a *resident* of the county in which the application for the discharge was made, was equivalent to stating that he was an *inhabitant* of such place, saying: "These words signify the same thing; a person resident is defined to be one one 'dwelling or having his abode in any place'; an inhabitant, 'one that resides in a place.'" In the matter of Thompson, 1 Wend. 44, it was held that under the act allowing an attachment against the property of a debtor who *resides* out of the state, an attachment might issue against the estate of a debtor who was resident abroad permanently or temporarily, the court saying: "The object of the statute was to authorize creditors to prosecute their debts when their debtors were abroad; and whether their absence from the state is permanent or temporary, whether it is voluntary or involuntary, the reason for giving this remedy to the creditor is the same." In Frost v. Brisbin, 19 Wend. 12, it was held that a person who had a domicile within the state, but carried on a business without the same which he superintended personally, was liable to arrest on civil process as a non-resident. In Haggart v. Morgan, 5 N. Y. 428—a case arising under the attachment law—it was held that a person may be a non-resident of the state within the meaning of the statute allowing an attachment against the property of non-resident debtors, although his domicile is within the state; and that actual non-residence, without regard to the domicile of the debtor, is what is contemplated by the statute. See also, upon the subject of residence, *In re* Wrigley, 4 Wend. 603; s. c., 8 Wend. 209.

TREASURER'S BOND—PLEA BY SURETY THAT HIS PRINCIPAL, WITH THE CONSENT OF THE DIRECTORS OF THE CORPORATION, HAD KEPT THE MONEY IN AN UNAUTHORIZED PLACE.—*Spring Hill Mining Co. v. Sharpe.* Supreme Court of New Brunswick. 16 Am. Law Reg. 237. Opinion by ALLEN, C. J. The condition of a bond, given for the faithful discharge of the duties of the treasurer of an incorporated company, declared that S (the treasurer) should well and truly account with the company and the directors thereof, whenever required, for all moneys, etc., which should come into his hands as treasurer, and should well and faithfully obey all such by-laws, orders, directions and instructions as the board of directors of the company should make, prescribe and appoint. One of the by-laws of the company required that the treasurer should make his cash deposits in the bank of New Brunswick, as the money was received, and that all checks, to draw the same, should be signed by the president, or two directors of the company, and countersigned by the treasurer. In an action on the bond, alleging as a breach, that S had received money as treasurer, which he had neglected to pay over on request, and had converted to his own use, the surety pleaded, that before any breach of the bond, S, with the knowledge, consent and authority of the directors, did not deposit the money in the bank of New Brunswick, but kept it in his own custody, and paid out his own check, and as he thought proper. *Held*, on demurrer, that an order of the directors, not warranted by the act of incorporation or the by-laws, was no justification for the treasurer in misappropriating the money, and did not relieve the surety from liability. Citing Fellows v. Albert Mining Co , 3 Pugs. 203; Mactaggert v. Watson, 3 Cl. & F. 542; Salem Bank v. Gloucester Bank, 17 Mass. 28. The principle involved in this case is fully considered, and the law very clearly laid down by Mr. Justice Story, in the case of Minor v. The Mechanics' Bank of Alexandria, 7 Curt. 445. That was an action against the sureties in a bond given for the faithful discharge of the duties of the cashier of a bank. One ground of defense was, that by the usage and practiice of the bank, the cashier had allowed customers to overdraw their accounts, and to leave their checks and notes charged without funds in the bank to meet them; and it was contended on behalf of the sureties, that the jury should have been instructed that those facts constituted a defense to the action. Mr. Justice Story, delivering the judgment of the court, said: "If the instruction had been given, and thereupon a verdict upon these issues had been found for the defendants, could any judgment have been given upon these issues in favor of the defendants; or ought the judgment *non obstante veredicto* to have been for the plaintiff? If it ought, then the error becomes wholly immaterial, since in no event could the instruction, in point of law, have benefited the defendants. Upon deliberate consideration we are of opinion that the pleas on which these issues are founded are substantially bad. They set up a defense for the cashier, that his omission well and truly to perform the duties of cashier was by the wrong connivance and permission of the board of directors. The question then comes to this, whether any act or vote of the board of directors, in violation of their own duties, and in fraud of the rights and interest of the stockholders of the bank, could amount to a justification of the cashier, who was a *particeps criminis*? We are of opinion that it could not. However broad and general the powers of the directors may be for the government and management of the concerns of the bank, by the general language of the charter and by-laws, those powers are not unlimited, but must receive a rational exposition. It can not be pretended that the board could by a vote authorize the cashier to plunder the

funds of the bank, or to cheat the stockholders of their interest therein. No vote could authorize the directors to divide among themselves the capital stock, or justify the officers of the bank in an avowed embezzlement of its funds. The cases put are strong, but they demonstrate the principle only in a more forcible manner. Every act of fraud, every known departure from duty by the board, in connivance with the cashier, for the plain purpose of sacrificing the interest of the stockholders, though less reprehensible in morals, or less pernicious in its effects than the cases supposed, would still be an excess of power from its illegality, and, as such, void as an authority to protect the cashier in his wrongful compliance. Now, the very form of these pleas sets up the wrong and connivance of the board as a justification; and such wrong and connivance can not for a moment be admitted as an excuse for the misapplication of the funds of the bank by the cashier. The instruction prayed for proceeds upon the same principles as the pleas. It supposes that the usage and practice of the cashier, under the sanction of the board, would justify a known misapplication of the funds of the bank. What is that usage and practice, as put in the case? It is a usage to allow customers to overdraw, and to have their checks and notes charged up, without present funds in the bank. Stripped of all technical disguise, the usage and practice, thus attempted to be sanctioned, is a usage and practice to misapply the funds of the bank, and to connive at the withdrawal of the same, without any security, in favor of certain privileged persons. Such a usage and practice is surely a manifest departure from the duty both of the directors and the cashier, and can not receive any countenance in a court of justice. It could not be supported by any vote of the directors, however formal; and, therefore, whenever done by the cashier, is at his own peril, and upon the responsibility of himself and his sureties."

STATUTE OF FRAUDS—RECEIPT AND ACCEPTANCE OF GOODS.—*Ex parte Safford.* United States District Court, Dist. of Massachusetts. 15 Alb. L. J. 328. Opinion by LOWELL, J. Leather was bought on a credit of sixty days, by parol, and the goods were weighed in the presence of the buyer, and the damaged hides rejected and the shrinkage agreed on, and they were placed by themselves in the seller's warehouse and marked with the buyer's name, and he was to send for them when he pleased. He made an arrangement with the seller concerning the insurance of the goods. The course of dealing was usual between the parties. *Held*, the goods had been accepted and received by the buyer within the statute of frauds of Massachusetts, and they having been destroyed by fire in the seller's warehouse, that the seller could prove for the price against the assets of the buyer in bankruptcy. The latest authorities make the distinction between accepting goods and receiving them to be this: Goods may be constructively delivered, as to a carrier or warehouseman, and yet not accepted, if, for instance, they were ordered by a person who had not seen them, or were bought by sample; for the carrier or warehouseman is not, as such, without special appointment, the agent of the buyer to ascertain that the goods conform to the order or to the sample; and, therefore, in such a case the goods may be received and yet not accepted. It was formerly said that the goods must be received and an opportunity be given to examine them before they could be accepted; but in a very elaborate opinion of the Queen's Bench this doctrine was denied to be sound, and a defendant was held bound who had exercised acts of ownership over the goods, though he had not precluded himself from objecting that they did not conform to the contract; or, in other words, that there might be an acceptance to satisfy the statute, and let in proof of the contract, which yet would not be an acceptance under the contract itself when proved. Morton v. Tibbett, 15 Q. B. 428.

In Cusack v. Robinson, 1 Best & S. 299, Blackburn, J., says: "Acceptance may be before receipt," and it was there decided that specific goods agreed on and afterward sent to a warehouse named by the vendee, had been both accepted and received by him. Whether the courts of Massachusetts would assent to the full extent of the law laid down in Morton v. Tibbett, *ubi supra*, I do not know, nor, indeed, whether all the courts in England would; but I take it to be clear that by the law of this state, and of the United States generally, as well as of England, if specific goods are fully agreed on and bought, and afterward sent to a warehouseman or carrier designated by the vendee, the statute is satisfied. Ullman v. Barnard, 7 Gray, 555; Cross v. O'Donnell, 44 N. Y. 661; Howes v. Ball, 7 B. & C. 484; Dodsley v. Varley, 12 A. & E. 632. There is no doubt that the vendor may himself be the warehouseman or bailee. This was decided in the leading case of Elmore v. Stone, 1 Taunt. 458. I have seen it stated that this case has been overruled; but that is a mistake. It was cited and followed in Beaumont v. Brengeir, 5 C. B. 313, and Marvin v. Wallis, 6 Ellis & B. 726, and its doctrine re-affirmed in Cusack v. Robinson, *ubi supra*. See Benj. on Sales (2d Am. ed.), 136. It is stated with approval, though not named, by Shaw, C. J., in Arnold v. Delano, 4 Cush. 40. If the decision were to turn merely on the conditional contract of insurance made by the vendee, that would be sufficient evidence to warrant a jury in finding a receipt of the goods. The cases are many where a sale or a mere offer to sell, or a request by the vendee to the vendor to sell on account of the vendee, and various other acts of ownership have been held sufficient for that purpose, though the goods remained in the actual possession of the vendor, or of a middleman. Chaplin v. Rogers, 1 East, 192; Bienkinsop v. Clayton, 7 Taunt. 597; Marvin v. Wallis, 6 Ellis & B. 726; Castle v. Sworder, 6 Hurlst. & N. 828; Amsen v. Dreher, 35 Wis. 615. It may be said that a resale would be a fraud on the vendor if the goods are not the property of the vendee, and that for this reason the latter is estopped; but the true reason for the decision is that such an act is of itself evidence of acceptance and receipt, and a contract of insurance is fully as significant in this respect. It was argued that, in a certain sense, the lien of the vendor was not gone, because, if the vendee had become insolvent, it might have revived under the decision in Arnold v. Delano, 4 Cush. 33, and similar cases; and it was added that so long as the right of stoppage in transition was not lost, there could be no receipt by the vendee; but there are many decisions to the contrary of that statement, and none in its favor, that I have seen. In Bushell v. Wheeler, 15 Q. B. 422, n., Coleridge, J., said of the right to stop in transitu: "That is a bad test; there might be stoppage in transitu, though there had been a note in writing." Lord Denman, C. J., made a similar remark in delivering the opinion of the court; and the decision covers the point. So are Cross v. O'Donnell, 44 N. Y. 661; Castle v. Sworder, 6 H. & N. 828; and in point of principle the following cases, as well as those above cited in which accepted goods delivered to a carrier were held to have been received by the vendee, within the statute, though in most of them the right of stoppage might have been exercised if the vendee became insolvent; Dodsley v. Varley, 12 A. & E. 632; Howes v. Ball, 7 B. & C. 484; Pinkham v. Mattox, 53 N. H. 600. The revival of the vendor's lien in case of insolvency is an equitable doctrine very difficult to explain at common law; but it arises only upon bankruptcy or insolvency, and does not then revest the

property; and the cases above cited hold that this possibility of revival does not prevent the operation of the statute. The cases of Knight v. Mann, 118 Mass. 143; s. c. 120, *Ib.* 219; Safford v. McDonough, *Ib.* 290, are not in point against the plaintiff in this case.

NOTES OF RECENT ENGLISH DECISIONS.

BILLS OF EXCHANGE DRAWN AGAINST SHIPMENTS—VENDOR AND PURCHASER—BANKRUPTCY OF PURCHASER—SPECIFIC APPROPRIATION OF PROCEEDS OF SALE OF GOODS SHIPPED.—*In re Entwisle.* Court of Appeal, 25 W. R. 239. The vendors, a firm at Bombay, shipped cotton to a purchaser in London, drawing bills against him for the amount of the invoice prices of the cotton, with a direction to place the amount to the account of the shipments. The purchaser accepted the bills, and received the bills of lading, but his acceptances were dishonored at maturity and were taken up for the honor of the vendors by their London agents. The purchaser subsequently went into liquidation, and the London agents claimed the proceeds of sale of the cotton as against the trustee in the liquidation. *Held*, that there had been no specific appropriation of the proceeds of the cotton to answer the bills of exchange, and that the trustee was entitled. Frith v. Forbes, 11 W. R. 4, 4 De G. F. & J. 409, was cited by the appellants. JAMES, L. J., said that the case relied upon by the appellants was inapplicable. It only decided that, as between principal and agent, a direction given by the principal as to the appropriation of the proceeds of the sale of goods was binding on the agent, so that the latter could not set up his own general lien against it. But in a case like the present, between vendor and purchaser, the goods became the absolute property of the latter so soon as he received the bills of lading. MELLISH, L. J., and BAGGALLAY, J. A., concurred, the latter referring to Robey v. Ollier, 20 W. R. 956, L. R. 7 Ch. 695.

SALVAGE — INEQUITABLE AGREEMENT — EXORBITANT REMUNERATION — COMPULSION. — The *Medina*. Court of Appeal, 25 W. R. 156. The master of an English steamship on a voyage up the Red Sea, finding that a British steamship bound from Singapore to Jeddah with a general cargo and 550 pilgrims, who had been taken on board as passengers at Sumatra, was wrecked on a rock about 240 miles from Aden, made an agreement with the master of the wrecked steamship to take the pilgrims off from the rock where they had been landed, and were in danger of their lives if bad weather had set in, and to carry them to Jeddah for £4,000; and the agreement so made was carried out. On an action to enforce the agreement being brought against the owners of the wrecked steamship, *Held*, that the agreement must be set aside as inequitable. Judgment of the Admiralty Division (reported 24 W. R. 928, L. R. 1 P. D. 272), affirmed. JAMES, L. J.—I am of opinion that upon the balance of evidence the decision of the court below was a right decision. If the story of the defendant is the right one, the story of the plaintiff is the wrong one, and as to that we see no reason for coming to a different conclusion to that at which the court below arrived. Then we come to whether this was an exorbitant sum which was got by compulsion, making it inequitable that the agreement should be enforced. It was stated in the court below that there were 550 pilgrims on a rock whose lives might have been endangered at any moment. There was one ship, and one ship only, near them, and the captain of that ship says, "I will take these pilgrims to Suez for £3,000; I will not take them for a farthing less." It involved nothing whatever but the mere taking the men on board and carrying them on to Suez. Afterwards he says, "I will take them to Jeddah for £4,000." The defendant denies the offer of the £3,000; but, according to his own account as to what was asked, £4,000 was a very exorbitant sum for a captain of a ship coming up to the rock, to demand for merely taking the pilgrims on board and carrying them on to a point defined only a few days out of its course. I agree that the conclusion of the judge of the Admiralty Division was right, that it was exorbitant, and, having regard to the peculiar circumstances, and that pressure was exercised, that it ought not to stand. Therefore, the court was right in giving a reasonable amount. That reasonable amount the court below, with the assistance of the two assessors, fix at £1,300.

BUILDING CONTRACT—BANKRUPTCY OF CONTRACTOR—NON-COMPLETION—"LIQUIDATED DAMAGES"—PENALTY. *In re Newman.* Court of Appeal, 25 W. R. 244. By a building contract, the contractors covenanted (amongst other things) to deliver up the buildings completed by a certain date, and in default to pay £10 for every week after that date until completion. Powers were given to the employers' surveyor, on noncompliance with his requisitions as to matters therein mentioned, to take the necessary steps himself, the expenses so incurred being recoverable as "liquidated damages." The employers were empowered to rescind the contract on the bankruptcy of the contractors, without prejudice to their right of action for noncompletion, and by the last clause the contractors were to pay £1,000 as "liquidated damages" in case the contract should not be "in all things duly performed." Before completion of the buildings the contractors filed a liquidation petition, and the trustees under the liquidation disclaimed the contract. The employers claimed to prove in the liquidation for £1,000. *Held*, (reversing the decision of Bacon, C. J., reported, 25 W. R. 100), that the £1,000 must be treated as a penalty, and could not be proved against the debtor's estate in the liquidation. Kemble v. Farren, 6 Bing. 141; Astley v. Weldon, 2 B. & P. 346, and Magee v. Lavell, 22 W. R. 334, L. R. 9 C. P. 107, followed and approved. JAMES, L. J.—I am of opinion that this case is clearly within the cases which have been referred to by appellants. The authority of Kemble v. Farren is not to be considered as in any way impugned by those cases before Lord Wensleydale which have been referred to, and which are sought to be confined to a case in which, amongst other stipulations, there was one stipulation for payment of a sum of money. That is not the *ratio decidendi* in Kemble v. Farren, in which it was laid down in broad terms that, wherever there is a sum fixed at the end of a contract for damages for nonperformance of a great number of things, then it must be treated as a penalty. To my mind, the law is really stated in a very satisfactory way in a case which was referred to in the argument in Kemble v. Farren. That was a case in the Common Pleas before Lord Eldon and the other judges, Ashley v. Weldon, 2 B. & P. 346, and in that case Mr. Justice Heath said: "Where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty. But where it is agreed that, if a party do such a particular thing, such a sum shall be paid by him, then the sum stated may be treated as liquidated damages." And then Mr. Justice Chambre gives us an instance: "There is one case in which the sum agreed for must always be considered as a penalty; and that is, where the payment of a smaller sum is secured by a larger. In this case it is impossible to garble the covenants, and to hold that in one case the plaintiff shall recover only for the dam-

ages sustained, and in another that he shall recover the penalty. The concluding clause applies equally to all the covenants." Then Lord Eldon says: "There are many instances of the defendant's misconduct which are made the subject of specific fines by the laws of the theatre. Are we, then, to hold that, if the defendant happens to offend in a case which has been so provided for by those laws, she shall pay only 2s. 6d. or 5s., but if she offend in a case which has not been provided for, she shall pay £200?" That appears to me to apply exactly to the case before us with regard to the point which the respondents have pressed upon us, because there are in this agreement provisions in the nature of liquidated damages for specific things. That is to say, "for such and such a breach you shall pay the extra expense occasioned, and for such and such another breach you shall pay the actual costs occasioned, and for another breach you shall pay £10 a week." Those were all covered by the general clause at the end. Is it to be held that, if the defendant happens to offend in any one case which has been provided for by those special stipulations, then he shall pay only the actual damages thereby occasioned, but if he offends in any one case which has not been so provided for, he shall pay £1,000? This case is exactly within the very words of Lord Eldon. The fact that there are those special provisions made for special cases, and that at the end there is a lump sum of £1,000 put in for any breach (which includes all those breaches for which special provision is made) would make the defendant have to pay actual damages in the one case and in addition to that have to pay £1,000. It would require a very strong case indeed to oust the application of that doctrine which was laid down in Kemble v. Farren.

RECENT LEGISLATION.

MISSOURI LEGISLATURE—SESSION OF 1877.

AN ACT to repeal an act entitled "An Act to regulate the taking of depositions in civil cases in the County of St. Louis," approved February 17, 1875.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. That an act entitled "An Act to regulate the taking of depositions in civil cases in the County of St. Louis," approved February 17, 1875, be, and the same is hereby repealed.

Approved April 9, 1877.

AN ACT to amend section 1 of an act concerning notaries public, approved March 25, 1875.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SEC. 1. Section one of an act concerning notaries public, approved March 25th, 1875, is hereby amended by inserting in the second line of said section, after the word county, the words "and incorporated city," so that said section shall read as follows: Section 1. The governor shall appoint and commission in each county and incorporated city in this state, as occasion may require, one or more notaries public who shall hold their offices for four years; but no person shall be so appointed who has not attained the age of twenty-one years, and who is not a citizen of the United States and of this state.

SEC. 2. An emergency having arisen by reason of the ratification of the separation-scheme and charter in the city and county of St. Louis, under article nine of the constitution of this state, and there being no provision of law to appoint the officers named in this act, it is hereby declared that this act shall take effect and be in force from and after its passage.

Approved April 6th, 1877.

AN ACT to regulate conditional sales of personal property, and providing that a violation thereof shall be a misdemeanor.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. In all cases where any personal property shall be sold to any person, to be paid for in whole or in part in installments, or shall be leased, rented, hired or delivered to another on condition that the same shall belong to the person purchasing, leasing, renting, hiring or receiving the same whenever the amount paid shall be a certain sum, or the value of such property, the title to the same to remain in the vendor, lessor, renter, hirer or deliverer of the same until such sum, or the value of such property, or any part thereof, shall have been paid, such condition in regard to the title so remaining until such payment shall be void as to all subsequent purchasers in good faith and creditors, unless such condition shall be evidenced by writing executed, acknowledged and recorded as provided in cases of mortgages of personal property.

SEC. 2. Whenever such property is so sold, or leased, rented, hired or delivered, it shall be unlawful for the vendor, lessor, renter, hirer or deliverer, or his or their agent or servant, to take possession of said property without tendering or refunding to the purchaser, lessee, renter or hirer thereof, or any party receiving the same, the sum or sums of money so paid, after deducting therefrom a reasonable compensation for the use of such property; which shall in no case exceed twenty-five per cent. of the amount so paid, anything in the contract to the contrary notwithstanding, and whether such condition be expressed in such contract or not, unless such property has been broken or actually damaged, and then a reasonable compensation for such breakage or damage shall be allowed.

SEC. 3. Any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor.

Approved April 2, 1877.

AN ACT to prevent the mortgagor or grantor in trust deeds of personal property from the fraudulent use or disposition of such property, and to prevent the mortgagor or grantor from disposing of the same without the written consent of the mortgagee or trustee, and without informing the person to whom the same is sold of such mortgage or trust deed.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. That any mortgagor or grantor in trust deeds of personal property, who shall injure, destroy, sell or dispose of such property, or any part thereof, or shall aid or abet in the so doing for the purpose of defrauding the mortgagee, trustee or beneficiary in trust deeds, or his, or their assigns, or shall remove or conceal, or shall aid or abet in the removing of such property or any part thereof, with intent to hinder, delay or defraud such mortgagee, trustee, or beneficiary, or his or their assigns, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by imprisonment in the county jail not exceeding one year, or by a fine not exceeding one hundred dollars, or by by both such fine and imprisonment.

SEC. 2. That every mortgagor or grantor in trust deeds of personal property, who shall sell or convey the same or any part thereof, without the written consent of the mortgagee or beneficiary, and without informing the person to whom the same is sold or conveyed, that the property is mortgaged or conveyed by deed of trust, shall, on conviction, be adjudged guilty of a misdemeanor, and punished by a fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

Approved April 7th, 1877.

AN ACT to amend section 28 of chapter 160 of the General Statutes relating to executions.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. That section 28 of chapter 160 of the General Statutes be amended as follows: By striking out the words "or otherwise" in the fourth line thereof, and inserting in lieu thereof the following words, "verified by affidavit or the affidavit of some creditable person;" and by inserting after the word "thereof," the second word in the fifth line, the following words "and shall in said written claim, verified as aforesaid, set forth the right, title, or interest of said claimant in and to said property or any part thereof;" and by inserting after the word "execution" in the sixth line the following words "and shall deliver to said officer the writing as verified, claiming such property," so that said section, as amended, shall read as follows:

SECTION 28. When personal property or any shares in any bank, company or corporation, or other effects, shall be seized by virtue of any execution, and any person other than the debtor in the execution shall in writing, verified by affidavit, or the affidavit of some creditable person, claim such property, or any part thereof, and shall in said written claim, verified as aforesaid, set forth the right, title or interest of said claimant in and to said property or any part thereof, and shall give notice thereof to the officer levying the execution, and shall deliver to said officer the writing so verified, claiming such property, such officer shall, as soon thereafter as practicable, notify the execution creditor of such claim and notice; and if the execution creditor shall fail, in reasonable time, to furnish and tender to such officer a bond, payable to him with good security, resident of the county, and conditioned to indemnify such officer against all damages and costs which he may sustain in consequence of the seizure and sale of the property so levied on and claimed, and to pay and satisfy to any person or persons claiming the same all damages which such person or persons claiming [may sustain] in consequence of such seizure and sale, the officer so making such levy may abandon it and release such property to the claimant.

SEC. 2. All acts and parts of acts, inconsistent with this act, are hereby repealed.

Approved April 7th, 1877.

AN ACT regulating the payment of the expenses of the St. Louis Court of Appeals, and the salaries of the judges thereof.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. So much of the salaries of the judges of the St. Louis Court of Appeals, as is required by law to be paid by the several counties of the district over which the jurisdiction of the court extends, shall be settled and paid in the first instance by the City of St. Louis, monthly, on the 15th of each and every month.

SEC. 2. The compensation of the marshal and janitor, and all expenses of stationery, fuel, and other things which may be necessary for the use of the St. Louis Court of Appeals, and which may be ordered by said court, shall, upon being properly audited and certified by said court, be paid by the City of St. Louis.

SEC. 3. On the 31st days of January and in July, in each year, the auditor of the City of St. Louis shall prepare a statement showing the aggregate amount of salaries and compensation, and the aggregate amount of all other disbursements contemplated in the foregoing provisions of this act, for the half year next preceding; and also showing the proportionate parts of such aggregate amounts respectively, apportioned to each of the counties composing said district, according to its taxable property; a copy of such statement shall be certified and transmitted by said auditor, without delay, to the clerk of the County Court of each of the counties included in said district.

SEC. 4. The County Court of each county receiving such statement shall, at its next term thereafter, order payment of its proportional parts of such salaries, compensation and disbursements, according to such statement and apportionment; whereupon the county treasurer shall pay over, in such manner as may be convenient, the sum so ordered to the city treasurer of the City of St. Louis.

SEC. 5. It appearing that great inconvenience, delay and unnecessary expense are incurred by the St. Louis Court of Appeals, and the judges and officers thereof, and also that an unfairness exists in the distribution of the current expenses of said court, for want of the legislation hereby intended, an emergency exists requiring the immediate enforcement of the foregoing provisions; wherefore, this act shall take effect and be in force from and after its passage.

Approved April 12, 1877.

AN ACT to provide for the publishing of the decisions of the Supreme Court of the State of Missouri, and for the appointment of a reporter thereof and fixing his salary.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION. 1. The attorney-general, state auditor, and secretary of state, shall contract with some suitable person or persons to publish the decisions of the Supreme Court of this state for a period of six years, and shall give notice by advertisement for at least twenty days in two English newspapers published in the city of St. Louis, that they will receive proposals for such contract, and the contract shall be let to the lowest and best bidder; *provided*, that said bid shall not exceed two dollars and a half per volume for the volumes furnished the state. The reports shall be equal in size, paper, binding, printing, and the amount of matter contained therein to the fortieth volume of the Iowa Reports; and the contract shall contain a provision that the reports shall not be sold to the public or the legal profession at a higher price than three dollars per volume; and the said contract shall also contain a provision requiring said publisher to keep on hand a sufficient number of each volume of said reports, or make such arrangements as to enable the legal profession, or the public, to obtain said reports at the price fixed by said contract. The reports shall be published in four months after there are sufficient decisions furnished the reporter for publication to make a volume, and the state shall be furnished with the number she may need before any are offered in the market for sale; *provided*: Such edition shall be examined and approved by the attorney-general before any part thereof shall be received by the state; and the approval of the said attorney-general shall be filed in the office of the secretary of state. The contract shall also contain a provision requiring the publisher of the reports to make stereotyped plates of the same. Bond shall be given to the state, with two or more sufficient securities, in the penal sum of ten thousand dollars for the faithful performance of the contract; which bond shall be approved by the attorney-general, state auditor and secretary of state, and filed in the office of the secretary of state. In case of the death of the person obtaining the above contract, or their failure to comply with its provisions, the attorney-general, state auditor and secretary of state shall rescind it, and make a new contract for the residue of the time of the original contract, in the same manner and on the same terms as

above provided; and in case of such failure to comply with the terms of the contract, the attorney-general shall immediately bring suit on the bond, on behalf of the state, for the damages that may have accrued to the state.

SEC. 2. The supreme court shall appoint a reporter on the taking effect of this act, who shall hold his office during the pleasure of the court, and shall receive an annual salary of two thousand dollars, which shall be paid out of the money appropriated for the publication of the supreme court decisions, each month, on the warrant of the state auditor. He shall be an officer of the court during his continuance in office, and shall have full access to the records of the court, and before entering upon the discharge of his duties, shall take the oath of office prescribed by the constitution. He shall be furnished by the secretary of state with the necessary stationery for his office.

SEC. 3. The supreme court reporter, in addition to the duties now imposed by law [shall] make a brief statement of the facts in each case, in place of that now required to be made in the opinion of the court, when such statement is not contained in said opinion, and he shall also prepare a brief statement of the points and citations of authorities of counsel, without argument, and said statement, points and authorities, and suitable head-notes, shall be prefixed to the opinion of the court, and so published.

SEC. 4. Nothing in this act shall be so construed as to prevent the present publishers of the decisions of the supreme court from completing volume sixty-four of said reports.

SEC. 5. All acts and parts of acts inconsistent with this act are hereby repealed.

Approved.

AN ACT to authorize counties, cities and towns to compromise their debts.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. That the various counties in this state for themselves, as well as for any townships therein, for which said counties may have heretofore issued any bonds, and the several cities and incorporated towns of this state, be, and they are hereby authorized and empowered to make and enter into contracts with any person or persons, corporations or associations, for the compromise, purchase or redemption of all bonds or coupons, whether due or not due, heretofore issued by the county courts of such counties, either for the counties themselves or for any township or townships therein, or by the proper authorities of any such city or town respectively, and including any judgments which have heretofore been rendered, or which may hereafter be rendered on said bonds or coupons; and said counties by their county courts, and said cities and towns by their respective authorities, are hereby authorized and empowered to execute and carry out such contracts; and for that purpose they may issue, negotiate and deliver new bonds on the surrender and cancellation of the old bonds or other indebtedness: *Provided*, that in no case shall the amount of the debt of any such county, township, city or town, nor the rate of interest on such debt be increased or enlarged under the provisions of this act. And, *provided* further, that no bond or obligation issued by any county court for or on behalf of any township in this state shall be purchased, redeemed or renewed, nor shall any contract be made therefor, unless the act entitled, "An Act to facilitate the construction of railroads in the State of Missouri," approved March 23d, 1868, shall have been previously decided to be a constitutional act by the courts of final jurisdiction having cognizance of the question. And, *provided*, also, that no new bonds issued under this act shall be payable in less than five nor more than thirty years from date thereof.

SEC. 2. The faith and credit of each and every county, township, city and town shall be, and they are hereby respectively pledged to carry out in good faith any contract made for the compromise, purchase or redemption of bonds, coupons as aforesaid, and such contracts so made; and all bonds, notes, obligations, or other undertakings issued, delivered, entered into, or undertaken, shall be valid and binding on the parties thereto; and any *bona fide* holder of such contract, entitled by its terms to a performance thereof, and any holder of such new bonds, notes, or other obligations, issued or entered into under this act, on obtaining a judgment in any court of competent jurisdiction against the municipal corporation so making such bond or other obligation, shall be entitled to have. On application to such court, the judge or judges thereof shall make an order appointing an assessor and collector, whose duty it shall be respectively to assess and collect, from all property liable to the payment of bonds or other obligations on which such judgment may have been obtained, a sum sufficient to satisfy such judgment, interest and costs; and for that purpose the said assessor and collector, and all other officers charged for the time being with any duty connected with the collection of the general revenue, shall have all the rights, powers and privileges enjoyed by assessors and collectors, or other officers authorized by law to collect the state and county revenue for the time being, and they shall be controlled in all respects by the laws in force at the time for assessing and collecting the state and county revenue: *Provided*, that no such order shall be made, until the proper authorities of such county, city or town shall have been duly notified of such judgment, and shall have neglected or refused to levy and collect a tax sufficient to pay such judgment. And, *provided* further, that for any judgment so obtained against any county for bonds or other obligations issued by such county for any township therein, the tax so levied in such case shall be collected from property within the township interested, in the mode and manner provided for the payment of the original bonds so compromised, purchased or redeemed.

SEC. 3. Nothing in this act shall be so construed as to alter, amend, repeal, or in any wise affect any existing law relative to the subject-matter of this act.

SEC. 4. It being important to the counties, cities and towns having a bonded indebtedness, that a speedy adjustment be made between them and the holders of such bonds, therefore an emergency exists, which requires that this act should go into immediate effect, and therefore this act shall take effect and be in force from and after its passage.

Approved April 12th, 1877.

ILLINOIS LEGISLATURE—SESSION OF 1877.

AN ACT to define and punish conspiracies in the State of Illinois.

SECTION 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly*, That if two or more persons conspire, either to commit any offense against the State of Illinois, or any county, incorporated city, village, town or township thereof, or to defraud the State of Illinois, or any county, incorporated city, village, town or township thereof, in any manner, or for any purpose; and one or more of such parties do any act to effect the object of the conspiracy, all parties to such conspiracy shall be liable to a penalty of not less that one hundred dollars, and not more than five thousand dollars, and to be imprisoned either in the penitentiary or county jail for any period not

exceeding two years; the time and place of confinement, and the amount of the fine, to be determined by the jury trying the case: *Provided, however*, this act shall not be construed to modify or repeal any other law now in force in this state.

Approved April 19th, 1877.

AN ACT to amend section 7 of an act entitled "An Act to regulate the Illinois Industrial University, and to make appropriations therefor," approved May 7, 1873.

SECTION 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly*, That section 7 of an act entitled "An Act to regulate the Illinois Industrial University, and to make appropriations therefor," approved May 7, 1873, be amended to read as follows: SEC. SEVEN (7). The treasurer of the said University, and the said board, are hereby required in the future to invest the principal of the funds arising from the endowment granted by the United States in interest-bearing bonds of the United States, or of this state, or in good county or school-district bonds of this state. They are hereby prohibited from changing the securities in which said fund may be invested, except for reinvestment in interest-bearing bonds of the class and character specified above in this section.

SEC. 2. Whereas, a portion of the investments of said fund will terminate in the month of May, and for that reason an emergency exists requiring that this act should take effect immediately; therefore, this act shall take effect and be in force from and after its passage.

Approved this 17th day of April, 1877.

AN ACT to amend an act entitled "An Act to revise the law in relation to criminal jurisprudence," approved March 27, 1874.

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That sections two hundred and seventy (270) and two hundred and seventy-one (271) of "An act to revise the law in relation to criminal jurisprudence," approved March 27, 1874, be and the same hereby are so amended as to read as follows:

SEC. 270. All persons who are idle and dissolute, and who go about begging; all persons who use any juggling or other unlawful games or plays, runaways, pilferers, confidence men, common drunkards, common night-walkers, lewd, wanton and lascivious persons, in speech or behavior, common railers and brawlers, persons who are habitually neglectful of their employment or their calling, and do not lawfully provide for themselves, or for the support of their families, and all persons who are idle or dissolute, and who neglect all lawful business, and who habitually misspend their time by frequenting houses of ill fame, gaming houses or tippling shops; all persons lodging in, or found in the night-time in out-houses, sheds, barns or unoccupied buildings, or lodging in the open air, and not giving a good account of themselves, and all persons who are known to be thieves, burglars, or pick-pockets, either by their own confession or otherwise, or by having been convicted of larceny, burglary, or other crime against the laws of the state, punishable by imprisonment in the state prison, or in a house of correction of any city, and having no lawful means of support, are habitually found prowling around any steamboat landing, railroad depot, banking institution, broker's office, place of public amusement, auction room, store, shop, or crowded thoroughfare, car or omnibus, or at any public gathering or assembly, or lounging about any court room, private dwelling-houses or out-houses, or are found in any house of ill fame, gambling house, or tippling shop, shall be deemed to be and they are declared to be vagabonds.

SEC. 271. It shall be the duty of the sheriff, constable, city marshal, and police officers of any county, town, village, city, or other municipality in this state, to arrest upon view, or acting at the request of any person: *Provided*, such person shall have first made a written complaint and obtained a warrant from an officer authorized to issue one for the arrest of any such vagabond, to arrest and bring before the nearest justice of the peace or police justice, any such vagabond, wherever he may be found, for the purpose of an examination; and the said sheriff, constable, city marshal, police officer, or other officer, shall then and there make complaint against such vagabond, and the said justice of the peace or police justice shall, within thirty-six hours thereafter, proceed to try the person accused of being a vagabond; and if he pleads guilty, or if he be found guilty, the said justice of the peace, or police justice, may sentence the said vagabond to imprisonment, at hard labor upon the streets or highways or in the jail, calaboose or other building used for penal purposes, of the county, town, village, city, or other municipality in which such vagabond was convicted, or to the house of correction of any city having a contract with such county for the care of prisoners, for a term of not less than thirty days and not exceeding six months, in the discretion of the said justice of the peace or police justice; or the said justice of the peace or police justice may sentence the said vagabond to pay a fine of not less than twenty dollars nor more than one hundred dollars, and costs of suit; and in default of the immediate payment of said fine and costs so imposed, said vagabond shall thereupon be sentenced to imprisonment or hard labor in said jail, calaboose or other building used for penal purposes, or in said house of correction, or on the streets or public highways, for a term of not less than thirty days nor more than six months, by the said justice of the peace or police justice. In all camplaints under the act, this complainant shall set forth the name of the offending person, if he can obtain the same, the place and date of the offense, and shall also set forth such other facts as will, if substantiated by competent witnesses, establish the guilt of the prisoner. The justice may cause to be subpœnaed such witnesses as the defendant may request, and may be found within the jurisdiction of such officer issuing such writ of aarest, and the complaint shall be signed and sworn to by the complainant. In all cases under this act the justice shall make a full record of the case, giving the date of the complaint and of the offense, name of the defendant (if known), and character of the charges, the names of all witnesses examined, and his findings, together with all other proceedings had in the case; and when he shall commit any vagabond to the jail, calaboose, or other building used for penal purposes, as hereinbefore stated, or to the house of correction of any city, he shall make out a mittimus, and sign the same, directing the same, in the name of the people of the State of Illinois, to the sheriff of the county, or to the superintendent of the house of correction of the city, or to any officer having charge of any such jail, calaboose or building used for penal purposes, aforesaid, as the case may be; which said mittimus must show the date of the charge, name of the complainant, name of the defendant (if known), the offense charged, names of all witnesses examined, date and place of trial. the finding of the court, and the sentence imposed; and it shall command the said sheriff, or the said superintendent of the house of correction, or any other such officer as aforesaid, as the case may be, to receive and to keep the body of the said defendant, as said mittimus may provide, until the expiration of the time

specified in the sentence, or until he be discharged by due process of law; which said mittimus shall be sufficient warrant to the said sheriff, or to the said superintendent of the house of correction, or other officer, as the case may be, to hold the body of the said defendant, as by the terms of sentence as in such mittimus commanded: *Provided*, that nothing herein shall be construed to prohibit the officer in charge of any such jail, calaboose, house of correction, or other building used for penal purposes, from compelling such prisoner to work at reasonable labor for the benefit of any such county, town, village, city, or other municipality, wherein said prisoner may have been convicted.

Approved April 27, 1877.

ABSTRACT OF DECISIONS OF ST. LOUIS COURT OF APPEALS.

October Term, 1876.

HON. EDWARD A. LEWIS, Chief Justice.
" ROBERT A. BAKEWELL, } Associate Justices.
" CHAS. S. HAYDEN, }

CONTINGENT INTEREST IN REAL ESTATE TRANSFERABLE—DEED EXECUTED BY WOMAN AS FEME SOLE—NAME DIFFERENT FROM THAT OF FATHER.—Although a contingent interest in land is not generally transferable at law, the assignment of it for a valuable consideration will be enforced in a court of equity; and when it becomes vested, the vendor will be compelled to convey pursuant to his agreement. The rule against conveyance of interest is done away in England by statute (8 and 9 Vic. ch. 106, § 6), and is contrary to our system and the Statute of Conveyances (Wag. Stat. 277, § 1), which says that "conveyances of land, or of any estate or interest therein, may be made," etc. A contingent remainder is not an *estate* in land, but it is an *interest* and will pass by deed. The deed of an heir for a valuable consideration, of all her right, title and interest in and to the real estate in possession and in expectancy of the estate of her father, also all other real estate of which he may have died seized, which she might inherit, etc., would pass such interest. Where there is no proof that a woman executing a deed was a *feme covert*, and it is executed by her as a *feme sole*, she will be presumed to have been *sole* at the time of executing. It merely appearing that her name was different from that of her father, such fact will not be considered as proof that she had been married, so as to shift the burden of proof as to her legal *status* at the time of the execution of the deed. Where the bill of exceptions does not show any conveyance of a portion of the property awarded in the decree, the judgment will be reversed. So ordered. Opinion by BAKEWELL, J.—*Lackland v. Nevins.*

March Term, 1877.

MECHANIC'S LIEN—SUB-CONTRACTOR—DEBT ASSUMED BY OWNER OF PROPERTY.—Where a contract has been made between the original and sub-contractor, for the construction or partial construction of a house, the fact that the owner subsequently agreed to pay the sub-contractor, will not prevent the sub-contractor from maintaining an action to enforce his lien, and against the original contractor for the contract price. Judgment reversed. Opinion by BAKEWELL J.—*Embrees v. Fowler.*

ACTION ON PENAL BONDS—JURISDICTION OF JUSTICE OF PEACE—PRACTICE—AMENDMENT IN COURT OF APPEALS.—A bond with a penalty, of $300, given under the local act of 1855, (Session Acts 1855) for property seized on execution, is not a bond for the payment of a sum of money within the meaning of § 5, p. 809, Wag. Stat. [Citing Wimer v. Brotherton, 7 Mo. 264.] In an action on such a bond, the judgment would be for the penalty and the amount of the penalty determines the question of jurisdiction. [Citing St. Louis v. Fox, 15 Mo. 71.] The amount of the penalty being in excess of the jurisdiction of the justice, neither he nor the circuit court to which the case went by appeal, had power to do otherwise than dismiss. Judgment can not be allowed to stand against the principal, after dismissal as to sureties, as that would be to allow amendments in this court. Judgment reversed. Opinion by HAYDEN, J.—*State, to use etc., v. Brainard.*

PLEADING—FACTS, NOT CONCLUSIONS OF LAW, TO BE STATED—RECOVERY FOR GOODS SOLD FOR ILLEGAL PURPOSE—DAMAGES FOR VIOLATION OF ILLEGAL CONTRACTS.—In an action to recover for whiskey sold by plaintiff to defendant, allegations of conclusions of law were properly stricken out of the answer. It is the business of the pleaders to state only facts. The doctrine that plaintiff can not recover, when he knows that defendant intends to use the merchandise sold for an immoral or illegal purpose, does not prevail in this state. [Citing Michael v. Bacon, 49 Mo. 474.] The contrary is the sounder doctrine [citing Halman v. Johnson, Cowp. 341; Lloyd v. Johnson, 1 Bos. & P. 340; Hodgson v. Temple, 5 Taunt. 181.] But if the plaintiff himself, in making the sale, violated a positive law, though it was in relation to the revenue, the law will not aid him in reaping the fruits of his wrong. Citing Beldingo v. Pitkin, 2 Caines, 147; Wheeler v. Russel, 17 Mass. 257; Smith v. Manhood, 14 M. & W. 452; Cope v. Rowland, 2 M. & W. 149; Broom's Legal Maxims, 740; Story on Sales, 4th ed. § 497, 499. So the court below erred in striking out that part of the answer alleging that the contract for the sale of the whiskey included an undertaking on the part of plaintiff to defraud the government of its revenue. [Act July 20, 1868, 15 Stat. at. L. 125; Act July 13, 1866, Rev. Stat. (U. S.) p. 630, § 3257.] Judgment reversed. Opinion by HAYDEN, J.; Bakewell, J., not sitting.—*Curran v. Downs.*

CRIMINAL LAW—TAKING FORCIBLE POSSESSION OF REAL ESTATE—EMINENT DOMAIN—RIGHTS OF RAILROAD AFTER EXCEPTIONS TO COMMISSIONERS' REPORT.—After the proper proceedings have been had to condemn private property for railroad purposes, under article 5, Wag. Stat. p. 326, the corporation, or its agents and servants, may enter upon the land condemned and construct the road, without being guilty of a misdemeanor in violating section 26, p. 495, Wag. Stat., which prohibits the taking possession of real estate by force and violence without authority of law. Although exceptions to the report of the commissioners may have been duly filed, this will not suspend the right of the railroad company to take possession, but will only affect the amount of compensation. [Citing Wag. Stat. 327, § § 3, 4; Clark v. H. & St. Jo. R. R. Co., 36 Mo. 202; Beekman v. S. & S. R. R. Co., 3 Paige, 76.] The regularity of the condemnation proceedings furnishes a complete defense to a criminal prosecution against the servants of the corporation for taking possession. It is not necessary for the company to bring ejectment against the owners of the land. Judgment reversed, and judgment entered for defendant. Opinion by LEWIS, C. J.—*State v. Dickson.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

February Term, 1877.

HON. JAMES L. WORDEN, Chief Justice.
" HORACE P. BIDDLE,
" WILLIAM E. NIBLACK,
" SAMUEL E. PERKINS, } Associate Justices.
" GEORGE V. HOWK,

CRIMINAL LAW—DEFECTIVE JURY.—The trial of a criminal cause by a jury consisting of a less number than twelve, is unauthorized by law, and the verdict in such case is void; and where, during the trial, two jurors were discharged with the consent of the defendant, and the remaining ten jurors returned a verdict of guilty, the verdict should have been set aside. Judgment reversed. Opinion by WORDEN, C. J.—*Allen v. State of Indiana.*

PRINCIPAL AND SURETY—EXTENSION OF TIME TO PRINCIPAL.—Time given by the creditor to the debtor, without consideration and without the consent of the surety, will not discharge the latter; and the fact that the surety requested the creditor to have execution issued on a judgment against the principal, which he failed and neglected to do, will not release the surety. The surety might, at any time after it was rendered, have paid the judgment and assumed the collection of it for his own use. Judgment affirmed. Opinion by NIBLACK, J.—*Hogshead v. Williams et al.*

DESCRIPTION IN DEED—MONUMENTS AND MEASUREMENTS.—The rule of law is that monuments, fixed, natural or artificial objects, cognizable by the senses, control

measurements in deeds. The reason is that parties are supposed to inspect land before purchasing it, and they can easily recognize visible monuments and thus acquire a definite idea of the boundaries of the land, which they could not do by measuring distances with the eye. 61 N. Y. 348. Where a deed described the western boundary of the land sold as a line twenty-five rods from the boundary of the quarter section, and also as the highway on the western side of the premises sold, *held*, the latter description will control. Judgment affirmed. Opinion by PERKINS, J.—*Simonton v. Thompson.*

PROMISSORY NOTE—UNCERTAINTY IN PLEADING DEFENSE.—A single paragraph of answer can not perform the double office of denying the cause of action and confessing and avoiding it. It must be one thing or the other, and its character must be determined from the general scope of its averments, 10 Ind. 485; and where the defense, set up in paragraphs of answer to a suit on a note, was that the defendant executed the paper without reading it and supposing it to be a contract in reference to washing machines, the paragraphs did not controvert the execution of the note, but set up matter in evidence thereof, and did not amount to a plea of *non est factum*. Neither did they allege facts sufficient to bar the action, the note being in the hands of a *bona fide* holder. Judgment reversed. Opinion by WORDEN, C. J.—*Kimble v. Christie.*

MORTGAGE — CONDITIONAL OBLIGATION TO PAY MONEY.—Where a mortgage provided for the payment of $10,000.00, "to be paid by the mortgagor to the mortgagee when called on by said mortgagee, and the mortgagor does not agree to pay the above sum to no one else except said mortgagee; and the mortgagor expressly agrees to pay the sum of money above secured without any relief from valuation or appraisement laws;" and there was no note accompanying the mortgage, *held*, the mortgagor was not bound to pay the money absolutely, but only upon the condition of its being demanded by the mortgagee, and if the mortgagee failed to call for it, the mortgagor was not bound to pay it at all. The stipulation to pay without relief, etc., must be taken in connection with what precedes it, and had reference only to payment when called on by the mortgagee. Judgment reversed. Opinion by WORDEN, C. J. *Sebrell et al. v. Couch, Admr., etc.*

PLEADING EVIDENCE—WRITTEN INSTRUMENTS—JUDGMENTS.—The statute making copies of written instruments a part of the record, where they are the foundation of a pleading, does not make copies of other documents, not written instruments, a part of the record, though the pleading may be founded on them. A judgment is not a written instrument within the meaning of the statute, and a copy thereof need not be filed with a pleading founded upon it. 37 Ind. 281. And where a copy of a judgment is so filed, it does not become a part of the record in the case. 45 Ind. 134; 48 *Ib.* 527. To regard copies of documents, constituting evidence in the cause and filed with the pleading, as part of the pleading, would be to sanction pleading evidence instead of facts. Judgment affirmed. Opinion by WORDEN, C. J.—*Wilson v. Vance Admr. et al.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF NORTH CAROLINA.

January Term, 1877.

HON. RICHMOND M. PEARSON, Chief Justice.
" EDWIN G. READE,
" W. B. RODMAN,
" W. P. BYNUM,
" W. T. FAIRCLOTH, } Associate Justices.

ACTION AGAINST ADMINISTRATOR—PRESUMPTION BY ADMINISTRATOR DE BONIS NON AGAINST SURETY ON BOND OF FORMER ADMINISTRATOR—PARTIES.—In an action against an administrator for an account and settlement, where no final account appears to have been had, it is the intendment of the law that no final judgment or decree was ever rendered therein. An action brought by an administrator d. b. n. against a surety on the bond of a former administrator d. b. n. of the same estate for assets wasted by him, is properly brought in the name of the last administrator. The next of kin can not call for an account and settlement without having an administrator before the court.—*Landsdell v. Winstead.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF NEBRASKA.

April Term, 1877.

HON. GEORGE B. LAKE, Chief Justice.
" DANIEL GANTT,
" SAMUEL MAXWELL, } Associate Justices.

VENDOR'S LIENS—SECRET LIENS.—1. The doctrine that a vendor has a lien on the land conveyed for the purchase-money remaining unpaid, is repugnant to our statutes in relation to real estate, and is no part of the laws of this state. 2. The policy of our law is to discourage secret liens, and to require all instruments affecting the title of real estate to be entered of record. Judgment reversed. Opinion by MAXWELL, J.—*Edmister v. Higgins.*

LICENSE TO SELL LIQUORS.—A party who takes out a license to sell liquor, in a city of the second class, under the authority of sec. 586, ch. 58, of the General Statutes, is not required to take out a second license under an ordinance of the city, in order to legally conduct his business during the time and at the place mentioned in the first license. Opinion by LAKE, C. J.—*In re Schmitker.*

MURDER IN FIRST DEGREE—PRESUMPTION OF DEGREE OF MURDER.—1. The words "deliberate and premeditated malice," in the statutory definition of murder in the first degree, were intended to restrict murder in that degree to cases where deliberation was shown to have taken place before the commission of the crime. 2. Where a homicide is proved, the presumption is that it is murder in the second degree. Judgment reversed. Opinion by MAXWELL, J.—*Milton v. The State.*

DEFENSE TO AWARD—ARBITRATORS AS WITNESSES.—1. In an action on an award, the defendant may set up as a defense, that the arbitrators considered matters not submitted to them, or omitted to consider matters which were submitted, and may prove such matters in bar in an action on the award. 2. Arbitrators are proper witnesses to testify concerning what matters were presented before them, and whether or not they had considered all the matters so referred. Judgment reversed. Opinion by MAXWELL, J.—*Hall v. Vanier.*

PRACTICE IN CASES OF MISDEMEANOR—COMPLAINT—POWERS OF SCHOOL BOARD TO DISCHARGE TEACHER.—1. If the original complaint, in a case of misdemeanor appealed to the district court, be lost, the court may order a new complaint to be substituted, covering the same offense, as shown by the justice's transcript. 2. The district school board is specially vested by statute with the general care and management of the school, and the employment of teachers; and, as an incident to these powers, has a right to discharge a teacher for incompetency, or for any other sufficient cause, at the will and pleasure of a majority of its members. Judgment reversed. Opinion by LAKE, C. J.—*Bays v. The State.*

FRAUDULENT CONVEYANCE — PROOF OF FRAUD. — 1. Where a vendee has participated in the fraud of a vendor, by accepting from him a conveyance of real estate with the intent to hinder, delay or defraud the creditors of such vendor, the conveyance will be void as to those creditors, even though full consideration has been paid for such property. 2. The question of fraudulent intent is one of fact and not of law, and the degree of proof necessary to establish fraud is the same in equity as at law. Judgment reversed. Opinion by MAXWELL, J.—*Tootle et al. v. Dunn.*

ESTOPPEL.—If a company, incorporated with the exclusive privilege to establish and keep a ferry and wagon-bridge across a river, within a certain district, stand by and silently see and permit other parties to construct and complete another wagon-bridge across the same river, within the same district, or acquiesce and consent to the erection thereof, it will, by reason of such silence or assent, be estopped from controverting by injunction, or otherwise, the right of the other parties to use and repair such bridge. Judgment reversed. Opinion by GANTT, J.—*Fremont Ferry and Bridge Co. v. Dodge County.*

PETITION IN REPLEVIN — CONSTRUCTION OF HERD LAW.—1. A petition in replevin should state, that the plaintiff is the owner of the goods sought to be recovered (or has a special property therein, stating its nature); that he is entitled to the immediate possession of such goods; and that

the defendant wrongfully detains the same. Where a petition is defective for want of a meterial averment, and such averment is supplied by the answer, the defect in the petition will thereby be cured. 2. The object of the law is to afford a speedy and inexpensive mode of ascertaining the damages sustained by trespass of stock upon cultivated lands. Courts construe proceedings of this kind with great liberality in all matters, except as to jurisdiction. Judgment affirmed. Opinion by MAXWELL, J.—*Haggard v. Wallen.*

BASTARDY JUDGMENT—NEW TRIAL.—1. In an action for bastardy, on a verdict of guilty, it is the duty of the court to adjudge the defendant to be the reputed father of the bastard child; and a failure to do so will render the orders of the court for the support of the child erroneous. 2. Where, on the trial of a defendant under the bastardy act, an alibi was established by the testimony of two credible witnesses, in addition to that of the accused, as against the unsupported testimony of the mother of the child, the verdict of guilty should be set aside as being against the evidence. Judgment reversed. Opinion by LAKE, C. J.—*Spurgeon v. Clemmons.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF WISCONSIN.

January Term, 1877.

HON. E. G. RYAN, Chief Justice.
" ORSAMUS COLE, } Associate Justices.
" WM. P. LYON, }

ACTION TO QUIET TITLE—EVIDENCE—PLEADING.—1. In an action to quiet the title to land, by one in possession, who alleges that the defendants conveyed the land to him, but have since destroyed the deed which was never recorded, plaintiff must show, by a preponderance of evidence, that a deed of the land running to him was not only executed and acknowledged by defendants, but also *delivered* to him by them or with their consent; and in this case the evidence is *held* insufficient to establish such delivery. 2. Under the complaint, the question whether the plaintiff had paid or furnished a consideration, and was entitled to a conveyance in the first instance, is irrelevant, and evidence upon that question was properly rejected; the only issue being, whether such a conveyance was ever in fact delivered. Opinion by LYON, J.—*Eiden v. Eiden and Wife.*

MECHANIC'S LIEN—PARTY TO ACTION.—1. A subsequent purchaser or incumbrancer is a proper party to an action brought to enforce a specific lien for materials and labor. 2. The complaint alleges that plaintiffs furnished machinery of a certain value, used in repairing a certain mill; that such machinery was furnished at the request of J. H., and a portion of it at the request and upon the express orders of L. H.; that said mill then was and still is occupied by J. H., and "owned by one or both of said defendants in common or otherwise;" that L. H. claims some interest in or title to the lot on which the mill is situated; and that plaintiffs are not able to state what his precise interest or title is, but claim that, whatever it may be, it is subordinate to their lien. The complaint states the substance of the petition for a lien, and the date of its filing in the proper office, and demands a personal judgment against J. H. (but not against L. H.), and also that the amount claimed be adjudged a lien upon the mill building, machinery and fixtures, taking precedence of any interest of L. H. therein, and that the premises be sold, etc. *Held*, that upon the facts here alleged, L. H. is properly made a party defendant to the action. Opinion by LYON, J.—*Rice et al. v, Lucy Hall, imp.*

MECHANIC'S LIEN—WHEN JUDGMENT MAY BE REOPENED.—Where a judgment to establish and enforce a mechanic's lien has been taken without making the person who owned the property at the commencement of the action a party, he will not be bound by such judgment, but may litigate the right of the judgment plaintiff in a subsequent action between the parties interested, brought to recover the possession or to quiet the title. McCoy v. Buick, 30 Wis., 551. 2. The court by which the lien judgment is rendered may, however, upon motion of such owner and upon a proper showing of facts, set aside the judgment within a year after its entry, and admit the moving party to defend against the claim for a lien; and generally this course is best in order to avoid circuity of action and promote the interests of all parties concerned. 3. The statute makes a lien for work done or materials furnished in the construction of a building paramount to any other lien, which originates subsequent to the *commencement of the building* (R. S. ch. 153, § 1); and the judgment in a suit to enforce such a lien should not be re-opened on the motion of one who, before such suit was brought, had purchased the land at a mortgage foreclosure sale, merely on the ground that no part of the demand for labor and materials accrued before the execution and recording of the mortgage, it appearing that such mortgage was given after the building was commenced. Opinion by LYON, J.—*Lampson v. Bowen.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

January Term, 1877.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

NEW TRIAL—SURPRISE—NEWLY DISCOVERED EVIDENCE—EVIDENCE.—1. In an action in which there have been two trials, and the material question in issue is, whether 200,000 hedge-plants were delivered by the plaintiffs to one of the defendants, and on the second trial one M. is produced for the first time by the plaintiffs as a witness in their behalf, and M. testifies that he was present at the alleged delivery, gives evidence of the conversation had by the parties at the time, corroborates plaintiffs' witnesses, and defendants introduce evidence that said witness was not present at the time, and after a verdict for the plaintiffs, defendants file a motion for a new trial on account of surprise, which ordinary prudence could not have guarded against, supported by affidavits that they had no knowledge of M.; that his name was not mentioned on the former trial; that they were surprised at his evidence; that at the trial they had not time to prepare a defense thereto, and that if a new trial was granted, they could and would produce two or three witnesses to testify that no such man as M. was present or about at the time of the conversation: *Held*, that this court will not reverse the action of the district court in refusing a new trial. 2. Where several witnesses testify on a trial, in support of the plaintiffs' cause of action, to the effect that 200,000 hedge-plants were delivered on or about April 9th, 1873, to one of the defendants by plaintiffs, the acceptance thereof, and to their being in good condition at the time, and the defendants, after a verdict against them, ask for a new trial because of newly discovered evidence, which they could not with reasonable diligence have ascertained and produced on the trial, and the newly discovered evidence is the sworn statement of H. that one of said witnesses told him in the latter part of April, 1873, that said defendant had refused to accept the hedge-plants, excepting 75,000, because they were damaged; that said witness then told H. the plants were damaged by frost, and wanted H. to see the defendant and try to have him come and get the rest of the plants: *Held*, that such newly discovered evidence is not sufficiently material, to authorize the supreme court to reverse the order of the district court overruling the application for a new trial therefor. 3. The refusal of the court to overrule certain questions calling for conclusions of law of a witness, where the witness in response states acts and conversations, instead of giving any opinion of his own, is not necessarily such error as to cause a reversal of a judgment, even when the questions are asked in reference to the material issue in the case. The proper practice, however, is, under such circumstances, to allow only such interrogatories as will call forth all the particulars of the transaction, including the lesser and minor details. Opinion by HORTON, C. J.—*Taylor et al. v. Thomas et al.*

THE United States Supreme Court has adjourned till the second Monday in October, the time fixed by law. During the term the court disposed of 350 cases, four cases being left over undecided.